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THE CASE

OF

LONG *v.* BISHOP OF CAPE TOWN;

EMBRACING

THE OPINIONS

OF THE

Judges of the Colonial Court,

HITHERTO UNPUBLISHED,

TOGETHER WITH

THE DECISION OF THE PRIVY COUNCIL:

AND

PRELIMINARY OBSERVATIONS

BY

THE EDITOR.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
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On a recent occasion, the Archbishop of York gave notice of a motion for the appointment of a Select Committee of the Lords' House "to consider the connection existing between the Colonial Churches and the Church at home." This motion was to have been made on Thursday, the 21st of June, had not the House adjourned by reason of the ministerial changes then occurring, and no doubt it will be made at an early period.

On the occasion alluded to the Bishop of London, at presenting a petition from Miss Burdett Coutts, read two opinions upon the recent judgments in the cases of Long *v.* The Bishop of Cape Town, and of Bishop Colenso against the same Bishop, the one opinion being that of Mr. W. M. James, and the other that of the Attorney-General, Sir R. Palmer.

According to Sir R. Palmer these decisions have determined, as to Letters Patent—1st. That they create "no legal dioceses within the colonies." 2nd. That they create "no legal identity between the Episcopal Church presided over by these Bishops and the United Church of England and Ireland." 3rd. That they "do not introduce into the colonies any part of the English Ecclesiastical Law." 4th. That they confer on the Bishops "no legal jurisdiction or power whatever, and add nothing to any authority which the Bishops may have acquired by law or by the voluntary principle."

Mr. James, on the other hand, says, "The disturbance of men's minds on this subject has been produced by a perverse misapprehension of the decisions in the Privy Council.

"As long as the Colonial Church is maintained, as a branch of the Anglican Church under the supremacy of the Crown, it will possess ample power for the maintenance of discipline, doctrine and moral conduct in its Bishops and Clergy. The decisions of the Privy Council have left untouched the power of the *forum domesticum* of every Bishop over his Clergy, and the power which, by the constitution of the Church in the colony as

a voluntary association, is vested in the Crown as the Supreme Governor, Ordinary and Visitor."

A careful consideration of the case of Long, in the following pages, which give, *in extenso*, the opinions delivered by the Judges of the Colonial Court, not yet published, and without which the judgment of the Privy Council can hardly be properly apprehended, will enable even the non-legal reader to judge which of the two opinions referred to gives the most accurate result of the decision in Long's case at least.

Before giving the Report, it may be as well, with reference to the first part of Sir R. Palmer's 4th proposition, to recall to recollection that the powers of a Bishop are three-fold,—*Ordinis*—*Jurisdictionis*—and *Administrationis rei familiaris*.

Of these three, the two first need alone be considered. The first, *Ordinis*, gives the Bishop power to consecrate churches, to dedicate churches and take resignations of churches, to confer orders by ordaining priests and deacons, and to administer confirmation; and the power is not confined to any particular see, or to this or to that place, but is universal, extending everywhere.

The reader, it is apprehended, will search in vain for anything in the opinions, either of the Colonial Judges or in the decision of the Privy Council in Long's case, which, in any degree, disturbs this power of orders in the Bishop of Cape Town, and probably it was this power which Miss Burdett Coutts had chiefly, if not solely, in view when she bestowed her princely gifts on the Colonial Churches. It is no doubt true that the power of orders, though given by the Letters Patent, has not its source in them, inasmuch as it arises from the act of consecration, being inherent in the very office of a Bishop; but the words of Sir R. Palmer can hardly have been directed to the *source*, as distinguished from the *existence*, of the power; if the power be admitted to exist, that probably will satisfy the public mind.

As to jurisdiction, certainly it is not inherent in the office of Bishop,—it flows from the Crown. But, even as to jurisdiction, the words of Sir R. Palmer are hardly accurate. The decision in Long's case has not denied *all* jurisdiction to the Bishop. By his Letters Patent power is given to him to visit, suspend, depose, and even excommunicate, the clergy within his diocese.

There is nothing in the decision in Long's case which questions any of these powers; on the contrary, it says expressly, " with the Bishop's authority in spiritual affairs, or Mr. Long's obliga-

tions *in foro conscientiæ*, we have not to deal." All that the judgment does is to deny to the Bishop coercive jurisdiction, or power to enforce his judgments by depriving his clergy of their temporal rights, without resorting to the civil tribunals. Unless, therefore, temporalities make the Church, and conscience have in it no existence, it can hardly be said that the Bishop is by the decision in Long's case denied *all* jurisdiction.

Even coercive jurisdiction has not been altogether denied. The decision admits that the Bishop may require his Presbyters to do all that a Bishop in England may require his Presbyters to do. It says, "We think that the acts of Mr. Long must be construed, with reference to the position in which he stood as a clergyman of the Church of England towards a lawfully appointed Bishop, and to the authority known to belong to that office in England."

But the judgment denies the Bishop power to make himself the judge where temporalities are concerned, and requires him to resort to judges, appointed by the Crown for the trial of all causes, ecclesiastical as well as civil and criminal, according to established law and precedent. The law in England does the same, only the resort is to a laic tribunal constituted for the trial of Ecclesiastical causes alone.

The Bishop of London, after reading the contradictory opinions already alluded to, said, "If I were called upon to go to one of the colonies I should very much hesitate to divest myself of my connexion with the Church of England and Ireland and place myself under a new law, which I did not understand, and submit to be guided in my practice by the Metropolitan or Diocesan of one of those Colonial Churches, not knowing with any great distinctness what was the doctrine which I was called upon to promulgate."

It is not quite obvious how the difficulty of the supposed position has been created by this decision, or even by the decision in the other case of Bishop Colenso against the Bishop of Cape Town. In neither case does it seem that any of the parties was divested of his connexion with the Church of England, or that any "new law" affecting "the doctrine, which" any one "was called upon to promulgate," was recognized either by the Privy Council or by the inferior court.

In the case of Colenso, no doubt, a question of disputed doctrine, in regard to the authenticity of some parts of the sacred Scriptures, was the foundation of the proceedings; but Bishop

Colenso was not called upon by any known "law" to promulgate that doctrine, nor is the existence of any such law recognized by the decision of the Privy Council. The act of promulgating the Bishop's opinions was purely voluntary and gratuitous on his part; and, so far as regards the Clergy of his diocese, the Bishop has not called upon them to promulgate his opinions; and the existence of any law, by force of which he could call upon them to do so, if he should be disposed to venture thus far, has not been recognized by the decision of the Privy Council. All that was done was to question the existence of a jurisdiction in the Metropolitan to punish the Bishop for the promulgation of new doctrines; leaving the question whether the promulgation was a punishable offence, had the jurisdiction existed, untouched, and leaving also untouched the question whether the Bishop could have required his clergy to concur in such promulgation, a question which had never even been raised.

So far, however, as Long's case is concerned, the notion of such a difficulty as the Bishop of London suggested must surely have arisen from misapprehension of the true nature of that case, and of the way in which it was disposed of, for no question of doctrine, confining the "doctrine" to the teaching of the Church of England, was involved in it.

The question decided was one of discipline, viz., whether a Bishop had power to suspend and deprive a Presbyter for refusing to perform an act, the performance of which had been required of him by the Bishop? That depended upon how far the act required to be performed was one the performance of which might lawfully be required of the Presbyter. The Colonial Court, by a majority, held that whether the calling a Synod without the authority of the Crown, and making the Synod consist of Laity as well as Clergy, was legal or illegal, the Presbyter was bound to give notice for the election of such a Synod when required by the Bishop; whereas, the dissenting Judge (Bell) held that the Bishop had no power to call a Synod, without first obtaining the authority of the Crown; and that, even if he had such power, the Synod to be called must be composed of Clergy alone; and the Privy Council by its Judgment affirmed this opinion.

But the opinion of the dissenting Judge, and the judgment of the Privy Council, were rested upon the law of the Church, as it exists in England, not upon any law existing in the colony unrecognized in England. Thus far the case may be said to be not different from that of the writers of "Essays and Reviews."

There the offence alleged was one of commission—the publication of novel doctrines—and the question of offence or no offence was tried by the law of the Church, as it exists in England. In Long's case the offence alleged was one of omission, and the question was, as before observed, decided upon the law as it exists in England.

What was peculiar in Long's case regarded the power of the Bishop, supposing the offence alleged to have been established, to try and punish his Presbyter; moreover, to try the offender before a tribunal and with a form of procedure constituted by the Bishop himself; a tribunal consisting of the Bishop himself, as judge, and of clergy nominated by himself to be his assessors, in direct opposition to the law as it exists in England, and without the authority of any law in force within the colony; but in virtue of a power alleged by the Bishop to be inherent in his office of Bishop.

The Court below, by a majority, recognized such an inherent power in a Bishop, and sustained the suspension and deprivation inflicted in exercise of it. The dissenting Judge denied the existence of such inherent power, and the Privy Council by its judgment affirmed that denial; but neither the dissenting Judge below nor the Privy Council left the Bishop remediless—they both acknowledged his right to enforce obedience through the civil courts of the colony. Here, again, the opinion of the dissenting Judge, and the judgment of the Privy Council, were rested upon the law, as it exists in England. By this conclusion the Bishop's position in the Colony is not much different from that of a Bishop in England.

If the power of the Bishop to try and punish, given by the letters patent, had been preserved to him he could have exercised that power only as such power can be exercised by a Bishop in England, viz., by the appointment of a laic to act as his judge; and his position, now that that power has been found to have been taken away, is not much different; for clergymen offending by denying obedience to his office of Bishop, given him by the letters patent, which is undisturbed by the grant of a constitution to the colony, can still be tried and punished for their offence as well as if the matter had occurred in England. The only difference is that in England there is a laic court set apart for the trial of ecclesiastical causes alone; whereas, in the colony, there is but one tribunal for the trial of all causes. But in

England, as in the colony, the judge is laic; and in the colony, as in England, the judges will, in a case between persons acknowledging themselves to be members of the Church of England, administer the law applicable to the Church of England in England, as in fact the Colonial Court actually did when inquiring whether the act which the Bishop required Long to perform was one which in England a Bishop could have called upon his Presbyter to perform.

The grant of a Constitution to the Colony did not make the Bishop's Letters Patent void *in toto*. It only voided the power given by the Letters to the Bishop to constitute a Court for the trial of offences, as inconsistent with the powers given by the Constitution. The powers of the Bishop in other respects remain as they were before the date of the Constitution, except that he has not a coercive jurisdiction to enforce the powers given him by the Letters Patent; for that purpose he must resort to the tribunals existing or constituted under the Constitution.

It is time, however, that the decision in Long's case should speak for itself. A Report of it is to be found in Moore's Priv. Co. Cases; but that Report is not very accessible to general readers, and, moreover, is defective in this respect, that it omits to give the opinions of the Judges of the Colonial Courts, and merely states their import in a dozen of lines. This was unavoidable in a book of general reports, as these opinions are upwards of eighty pages in length; but their omission is to be regretted, because, without them, the case is incomplete.

The Judges of the Colonial Court considered carefully and elaborately the history of the law, and nearly exhausted all that can be said for and against the jurisdiction claimed by the Bishop. Their opinions are thus described by the Privy Council: "Though there was some difference of opinion amongst the three Judges who decided the case, no one who reads their opinions can fail to admire the great learning and ability which they have brought to bear upon the questions submitted to them, and the judicial temper and moderation which they have shown in a case calculated to produce great excitement in the colony."

The Judgment of the Privy Council affirmed, in substantive propositions, the conclusions in which the colonial Judges had concurred with each other, and also those of Mr. Justice Bell in which he differed from his brother Judges, without noticing

the steps by which any of the conclusions had been arrived at.

The necessary effect of excluding the opinions of the Colonial Judges from the Report has been to withhold from readers, legal and ecclesiastical, a full knowledge of the case, and particularly as full a statement of what may be said in support of the jurisdiction claimed by the Bishop, as is to be desired in a question of such general importance.

The succeeding Report has been prepared with the view of supplying this defect, by giving *in extenso* the opinions of the Colonial Judges before the Judgment of the Privy Council. It has not been thought necessary, however, to prelude these opinions with more than a short general account of the nature of the case.

The facts are shortly these: The Bishop, on the assumption that he was entitled to hold a Synod within his Diocese, without the assent of the Crown, and that he was entitled to make the Synod consist of Laity, as well as of Clergy, required Long, his Presbyter, to give notice in his church for a meeting of the Parishioners for the election of lay Representatives to such a mixed Synod.

Long disputed the right of the Bishop to call a Synod, without the previous permission of the Crown, and denied that a mixed Synod of Laity and Clergy was known to the Church of England. On these grounds he refused to give the notice required.

The Bishop treated this refusal as a punishable act of contumacy, and suspended Long from the exercise of his clerical functions, until he should have expressed regret for his disobedience and promised obedience for the future.

Long treated this suspension as a nullity. The Bishop then deprived him of his charge, and admonished him not to exercise his clerical functions, under pain of further censures.

Long, anticipating that the Bishop would interfere to prevent the use of his Church and the payment to him of a salary, with which his charge had been endowed by a gentleman, standing in relation to his Church pretty much in the position in which Miss Burdett Coutts stands with reference to other churches in the Colony, applied to the Supreme Court to interdict him from so doing.

After hearing all that the Bishop could allege, in support of the power he claimed a right to use over Long and his other

Presbyters, and what Long had to allege, as to the extent of obedience due from him to the Bishop, the Court (Mr. Justice Bell dissenting,) refused to give Long the Interdict he asked.

Long carried the judgment by appeal to the Privy Council, and the Privy Council, by its judgment pronounced on the 24th January, 1863, reversed the judgment of the Colonial Court and granted Long the Interdict he asked.

The judges of the Supreme Court, at refusing Long's application for an Interdict, delivered the following opinions:—

OPINIONS

DELIVERED BY

THE JUDGES OF THE SUPREME COURT

OF

The Cape of Good Hope.

THE CHIEF-JUSTICE (SIR WILLIAM HODGES).

THIS is an action brought by the Rev. Wm. Long, who claims to be incumbent and minister of St. Peter's Church, Mowbray, in this colony, against the Right Reverend Robert Gray, Doctor in Divinity, the Lord Bishop of Cape Town, for the purpose of having the rights of the plaintiff as such incumbent and minister declared, and for other purposes.

The facts, in every material particular, are undisputed. But the legal inferences which ought to be drawn from these facts, are neither few nor unimportant, for the case opens a subject of great novelty and intricacy, as well as of extreme interest.

In the year 1852, and again in 1854, the questions which we are required to decide upon these pleadings, were discussed in the English Parliament, and many of the leading statesmen and eminent lawyers who then took part in those discussions expressed views and opinions which are totally at variance with each other, and I can with truth affirm that it is with diffidence and distrust that I now proceed to express my opinion upon the question, as to what is the legal status and condition of the English Episcopal Church in this colony, founded as it is by Her Majesty's letters patent,—so far as the same relate to the authority or jurisdiction which can be lawfully exercised by the Bishop of the see over one of his presbyters.

I have, however, the satisfaction of knowing that my opinions are not binding on the parties, and that an appeal to a higher tribunal will not be withheld by this Court.

The bishopric of Cape Town was founded 25th June, 1847, by her Majesty's letters patent of that date. I shall hereafter have to refer to the recitals contained in this document, and also to certain powers given to the Bishop authorizing him to exercise authority and jurisdiction over his presbyters, but as

the same powers are repeated in the later letters-patent, granted on the 8th December, 1853, it is sufficient to state now that by this document, the colony of the Cape of Good Hope, with the island of St. Helena, was erected into a Bishop's see and diocese,—that the Right Reverend defendant, Robert Gray, was appointed Bishop of the see, and that his Grace the Archbishop of Canterbury was commanded by Her Majesty to ordain and consecrate him to be Bishop of the see in manner accustomed. And the letters patent declare that the Bishop so nominated, on being canonically ordained and consecrated by the Archbishop, according to the form of the United Church of England and Ireland, "might perform all the functions peculiar and appropriate to the office of the Bishop within the said diocese of Cape Town."

The Bishop having been duly and canonically ordained and consecrated Bishop by the Archbishop of Canterbury, in obedience to the directions contained in the letters patent, he entered upon the see as Bishop thereof.

It is material here to remark that at the time these letters patent were issued the Rev. Mr. Long was officiating in the colony as a minister of the English Episcopal Church at Graaff-Reinet, having been appointed such minister by the Governor of the colony, and his salary being paid, partly by the Government and partly by the Society for the Propagation of the Gospel, and partly by his congregation: and on the arrival of the bishop in the colony in February, 1848, Mr. Long held no licence or other authority for the performance of his functions as a minister of the Church of England, save and except his letters of orders as a deacon for Her Majesty's foreign possessions, granted by the Bishop of London on the 20th October, 1844, in pursuance of the provisions of the statute 59 Geo. III. c. 60.

Shortly after the arrival of the Bishop in the colony, Mr. Long applied to him, requesting that he might be admitted to priest's orders, and, Mr. Long having complied with the necessary directions, was admitted by the Bishop to the holy order of the priesthood, according to the form and manner of ordaining priests, as contained in the Book of Common Prayer. This included the taking of the usual oaths of allegiance, supremacy, against simony, and of canonical obedience, and subscription to the three articles of the thirty-sixth of the Ecclesiastical Canons of 1603, being first, that of the Queen's supremacy: secondly, the lawfulness of the use of the Book of Common

Prayer; and, thirdly, of the Thirty-nine Articles being agreeable to the Word of God.

After ordination, the Bishop granted letters of orders to the priesthood to Mr. Long, under the episcopal seal, and also letters of licence in the same form as certain subsequent letters of licence to officiate in the parish and district of Mowbray, to which I shall presently refer.

Under these letters of orders and licence Mr. Long continued in the cure of souls at Graaff-Reinet, and discharged the duties of a priest of the Church of England.

On the 23rd November, 1853, the Bishop, being then in England, resigned and surrendered his bishopric into the hands of the Archbishop of Canterbury, who duly accepted the same and declared the see to be void of the person of the surrenderer. The deed of resignation recited that the object of this proceeding was to render a contemplated division of the see more convenient and practicable.

Then followed the second letters patent, which were issued on the 8th December, 1853. In this document the former letters patent are recited, and it is also recited that Bishop Gray, the defendant, had been duly ordained and consecrated, and had become the bishop and ordinary pastor of the see, and had resigned his office of bishop, whereby the see or diocese had become and then was vacant. It is further recited that it had been represented to Her Majesty "by the Lord Archbishop of Canterbury that the see was of inconvenient extent, and that for the due spiritual care and superintendence of the religious interests of the inhabitants thereof, and for the maintenance of the doctrine and discipline of the United Church of England and Ireland within the colony of the Cape of Good Hope and its dependencies, and the island of St. Helena, it was desirable and expedient that the same should be divided into three or more distinct and separate sees or dioceses, to be styled the Bishopric of Cape Town, the Bishopric of Graham's Town, and the Bishopric of Natal: the Bishops of Graham's Town and Natal to be subject and subordinate to the see of Cape Town and the Bishop thereof, in the same manner as any bishop of any see within the province of Canterbury, is under the authority of the archiepiscopal see of that province, and the archbishop of the same."

Her Majesty then proceeds by these letters patent to erect and constitute the western portion of the colony of the Cape of

Good Hope to be a distinct and separate bishop's see and diocese, to be called the Bishopric of Cape Town; and the Right Reverend defendant is named and appointed to be the bishop of the see. The patent then proceeds to constitute the Bishop of Cape Town to be also Metropolitan Bishop in the colony of the Cape of Good Hope and its dependencies, and the island of St. Helena, "subject, nevertheless, to the general superintendence and revision of the Archbishop of Canterbury for the time being, and subordinate to the archiepiscopal see of the province of Canterbury."

The Bishops of Graham's Town and Natal are also ordained to be suffragan bishops to the Bishop of Cape Town; and metropolitan jurisdiction and powers of visitation are given to the Bishop of Cape Town, with a power to hear appeals from persons aggrieved by any judgment or decree pronounced by the suffragan bishops or their commissaries.

Having conferred these metropolitan powers on the Bishop of Cape Town, the letters patent proceed to constitute the bishop to be a body corporate with perpetual succession; with the usual powers to hold lands, to prosecute and defend suits, and to use a corporate seal; and provision is made for constituting a cathedral church in the city of Cape Town.

The remaining portions of the letters patent have been so much the subject of argument before us, that it is necessary to state them here, in detail, without abridgment; and it may be observed in passing, that the clauses agree generally with those which had been introduced in the first-mentioned letters patent.

They are as follows: "And we do by these presents further declare that the aforesaid Bishop of Cape Town and his successors may exercise and enjoy full power and authority by himself or themselves, or by the archdeacon or archdeacons, or the vicar-general, or other officer or officers hereinafter mentioned, to give institution to benefices, to grant licences to officiate to all rectors, curates, ministers, and chaplains of all the churches or chapels, or other places within the said diocese wherein Divine service shall be celebrated according to the rites and liturgy of the Church of England, and to visit all rectors, curates, ministers and chaplains, and all priests and deacons in holy orders of the United Church of England and Ireland resident within the said diocese; and also to call before him or them, or before the archdeacon or archdeacons, or the vicar-

general, or other officer or officers hereinafter mentioned, at such competent days, hours and places, when and so often as to him or them shall seem meet and convenient, the abovesaid rectors, curates, ministers, chaplains, priests and deacons, or any of them, and to inquire as well concerning their morals as their behaviour in their said offices and stations respectively; subject, nevertheless, to such rights of review and appeal as are hereinafter given and reserved."

And for the better accomplishment of the purpose aforesaid the letters patent provide for the appointment of certain dignitaries; and then the following clause follows: "That it shall be lawful for any party against whom any judgment, decree or sentence shall be pronounced by any of the said archdeacons, or by the vicar-general, or other officer or officers of the said bishop or his successor, to demand a re-examination and review of such judgment, decree or sentence before the bishop or his successors in person, who, upon such demand made, shall have full power and authority to affirm, reverse or alter the said judgment, sentence or decree. And if any party shall conceive himself aggrieved by any judgment, decree or sentence pronounced by the said Bishop of Cape Town or his successors, either in case of such review or in any cause originally instituted before the said bishop or his successors, it shall be lawful for the said party to appeal to the said Archbishop of Canterbury or his successors, who shall finally decide and determine the said appeal. Provided always, that in any such case of appeal or review, notice of the intention of the party to make such appeal or review shall be given to the Bishop or subordinate judge by whom the sentence appealed from or to be reviewed shall have been pronounced within fifteen days from the promulgation thereof."

"And we do further will and by these presents ordain that, in all cases in which an appeal shall be made or review demanded as aforesaid, a copy of the judgment or sentence in such case promulgated or given, setting forth the causes thereof, together with a copy of the evidence on which the same was founded, shall, without delay, be certified and transmitted by such subordinate judge to the said bishop or his successor, or by the said bishop or his successors, to the said Archbishop of Canterbury, as the case may require."

After the promulgation of these last-mentioned letters patent the Bishop returned to the colony on the 20th January, 1854,

and he alleges in the pleadings that, on his return, he claimed to exercise, and did exercise, jurisdiction over all curates, chaplains, ministers, priests and deacons in holy orders of the United Church of England and Ireland resident within the limits of the several dioceses.

It is at this point necessary to refer to an arrangement made between the Bishop and Mr. Long, whereby Mr. Long was removed from his cure of souls at Graaff-Reinet to a cure of souls in the parish and district of Mowbray; and it is in respect of an alleged grievance in respect of,—first, a suspension, and secondly, a deprivation from this cure of souls, that the present action is instituted. It appears that in 1853 the Rev. Mr. Hoets, having at his own cost built a church in the district of Mowbray, within the see of Cape Town, proposed to the Bishop that the building should be consecrated and held by the Bishop in trust for the see of Cape Town, and Mr. Hoets undertook to provide a certain annual sum for the maintenance of the two first ministers who might be placed in the church, he being allowed by the Bishop to nominate them, and Mr. Long was mentioned by Mr. Hoets to the Bishop, as being a fit person to be first incumbent and minister of the church, and also that he was willing to leave Graaff-Reinet and assume the care of the district.

After a long correspondence between the Bishop and the Rev. Mr. Hoets the arrangements were at last completed, and on the 2nd June, 1854, a deed of transfer was passed at the Deeds office in the colony, accompanied by a contract or declaration of trust, which was entered into by the Bishop of the one part, and the Rev. Mr. Hoets of the other part, whereby the latter transferred the building to the Bishop and his successors in perpetuity, in trust, to be consecrated, held and used as the parish church of Mowbray. Mr. Hoets also covenanted to pay a certain annual sum, secured by investments "to the clergyman or incumbent to be appointed and instituted to the spiritual charge of the church and parish during the incumbency of the first two incumbents thereof."

The following clause in the deed reserved Mr. Hoet's right of nomination: "And in consideration of the premises, the said Lord Bishop hereby covenants with the said John William van Rees Hoets, his heirs, executors, administrators and assigns, that the said Lord Bishop and his successors shall upon the presentment and nomination in writing of the said John William

van Rees Hoets, his heirs or assigns, or any of them, such person or persons so presenting being a male of full age, and in full communion with the Church in the diocese of Cape Town, or, if resident in England, with the established Church, and not otherwise, admit, institute and appoint unto the said endowment and unto the spiritual charge and care of the said church and parish such person, being a priest in holy orders of the United Church of England and Ireland, or any of the colonial churches in communion with the said United Church, and not subject to any spiritual or ecclesiastical censure or other impediment, as the first incumbent of the said church and parish. And so in like manner upon the death, resignation or removal for any lawful cause, of the said first incumbent, upon the like presentment and nomination of the said John William van Rees Hoets, his heirs and assigns, such person or persons presenting being a male of full age, and in full communion, as aforesaid, admit, institute and appoint such other person in the like holy order, as aforesaid, and not subject to ecclesiastical censure or impediment, as aforesaid, as and for the second incumbent of the said church and parish, subject, nevertheless, during the first and second incumbencies, to all such conditions and limitations under rights of patronage and presentments to benefices, as in England are exercised and held by the lay patrons thereof."

This deed having been executed by the Bishop and Mr. Hoets, the latter presented Mr. Long to the first incumbency, and Mr. Long having subscribed the usual oaths and articles, he accepted a licence from the Bishop, bearing date the 3rd June, 1854, in the following form: "Robert, by divine permission, Bishop of Cape Town, to our beloved in Christ, William Long, clerk, greeting,—We do by these presents give and grant unto you, in whose fidelity, morals, learning, sound doctrine, and diligence we do fully confide, our licence and authority to officiate and have the cure of souls in the parish and district of Mowbray, in the Western Province of the Cape of Good Hope, within our diocese and jurisdiction, in reading the common prayers and performing other ecclesiastical duties belonging to the said cure according to the form prescribed in 'the Book of Common Prayer, and administration of the sacraments and other rites and ceremonies of the Church according to the use of the United Church of England and Ireland,' and the canons and constitutions in that behalf lawfully established and promulgated, and not further or otherwise; subject, always, to every

such regulation or definition as we shall hereafter make of the extent or limits of the parish or district intended to be hereby assigned to your cure, and to any increase or diminution of the extent thereof, you have first before us subscribed the articles, taken the oaths, and made and subscribed the declaration which, in this case, are required by law to be subscribed, made and taken. Provided, nevertheless, that nothing in this licence shall extend or be construed to extend to abridge our episcopal authority and office, and the episcopal office and authority of our successors in administering holy ceremonies and performing the functions belonging to us, or prevent the exercise of our episcopal authority in specially appointing and authorizing the archdeacons and other ministers by us directed and authorized to read and take part in divine service in the said church and parish, and to preach therein on all proper occasions as we may order and appoint; hereby reserving to ourselves and our successors, bishops of Cape Town, full power and authority to revoke these presents, and all things herein contained, whensoever we shall see just cause so to do. In witness whereof, we have caused our seal, which we use in this case, to be hereto affixed. Dated this third of June, in the year of our Lord one thousand eight hundred and fifty-four, in the seventh year of our consecration."

On the same day that the licence bears date, Mr. Long and certain of the inhabitants of Mowbray presented a petition to the Bishop praying that he would consecrate the church, and on the 6th June the Bishop proceeded to consecrate the church according to the usual form, and delivered the deed in that behalf required.

The form in which the deed was framed is as follows. After reciting the petition and describing the building, it proceeds thus: "And we do hereby pronounce and decree the same to be for ever hereafter a church for the public worship of God, the preaching of His holy word, the administration of His holy Sacraments, the solemnization of matrimony, and the celebration of all other sacred ordinances therein, according to the ritual of the Church of England, and the canons and constitutions of the same Church, saving and reserving unto us and our successors, bishops of Cape Town, all ordinary and episcopal jurisdiction, rights and privileges."

No further authority or induction was given to Mr. Long, except that, in a sermon at the consecration service, the Bishop

referred to Mr. Long as having been appointed the future minister of the church, and Mr. Long thereupon entered upon his charge and received the stipend attached to his incumbency or cure of souls.

Such were the respective situations of the right reverend defendant and the Rev. Mr. Long, at the period when the unfortunate differences which have led to this suit sprung up; and I trust I may be permitted to express my deep regret that, in a church brought into existence, in the manner—for such objects—and with such motives, as are clearly expressed by the letters patent, any such differences should have arisen, and I should have greatly rejoiced if this court could have been relieved from the necessity of ascertaining the strictly legal rights of the parties; but as important principles are involved, to which both sides attach the deepest interest, it is necessary to enter into a short detail of the facts in difference as they occurred.

It appears that in January, 1857, the Bishop had convened a synod or assembly, composed of the bishop, clergy and laity, for the purpose of regulating Church matters within the diocese, and certain constitutions and acts were then agreed to. The Rev. Mr. Long refused to attend this synod. His views respecting it are thus stated in the pleadings: "That, believing it to be contrary to the constitution and the laws and customs of the Church of England that such synod or assembly should be held without the authority of the Crown or the legislature, and further believing that the laws attempted to be made at such synod would not be binding on any member of the said Church who did not desire to be so bound by them; and, moreover, that the laws likely to be made by a synod or assembly constituted in the mode proposed by the defendant would tend to abridge the liberties of ministers and members of the Church of England already in this colony, or likely to arrive here in future years, he declined to attend the said synod, or in any way to be bound by or concerned with its decisions; and the plaintiff further says that he then informed the defendant that he did not consider it his duty to attend, and would not so attend."

It does not appear that Mr. Long was in any manner coerced or interfered with, by the Bishop, in consequence of his refusal to attend this synod. But in 1860 the Bishop issued a pastoral letter, summoning a second synod of the diocese to assemble on Thursday, the 17th January, 1861, in the cathedral church of

St. George, Cape Town. Mr. Long on that occasion received copies of the pastoral letter, accompanied by a letter addressed to him by the Bishop. It is as follows:

"1st October, 1860.

"REVEREND AND DEAR SIR,—I forward herewith some copies of a pastoral letter addressed by me to the diocese for distribution in your parish. You will see from it that I have summoned a synod for the 17th January, 1861; and that I propose to hold a visitation in the Cathedral on the previous day. I shall feel obliged by your attending carefully to the enclosed printed regulations with regard to the election of delegates, and I shall feel thankful if you will forward to the Registrar of the diocese, at an early day, intimation of any important motions which you may wish to submit to the consideration of the synod. You will be good enough to consider this present note as your formal citation to the synod and the visitation.

"I am, reverend and dear sir,
Your faithful friend and brother,
"R. CAPETOWN."

To this letter the Bishop, on the 29th November, 1860, received the following reply from Mr. Long:

"Mowbray, 29th November, 1860.

"To the Right Rev. the Lord Bishop of CAPETOWN.

MY LORD,—I duly received your lordship's printed note of 1st October, enclosing 'some copies of a pastoral letter addressed by you to the diocese,' which note you desire me to consider as a formal citation to another synod which you have summoned for the 17th January, 1861, in terms of a resolution by the last synod, the constitution and orders of which, as made by the body so designated, you also append to the pastoral letter, as affording 'information for the qualification of delegates and electors, the course to be adopted by parishes,' &c. I ought, perhaps, to apologise to your Lordship for not having sent an earlier acknowledgment of your note; but, feeling that I could not conscientiously attend such a meeting, and that my views as to its legality for the 'purposes intended,' and its expediency, were unchanged, and even stronger than they were four years ago, I was not sure as to the best course to pursue, in order to give expression to those convictions. I beg, however, to state

that, although I am anxious to pay to your Lordship's office and authority that respect and obedience which our church enjoins, I cannot consent to receive the laws of a body which I know to be without sanction from the custom of the Church in the mother country, and which has authority neither from the Crown, whose supremacy in matters civil and ecclesiastical I am bound to acknowledge, nor from the legislature of this colony. Against this body as an unlawful assembly I protested, in conjunction with the minister of Trinity Church, on the occasion of its last meeting. I likewise signed a general protest against it, copies of which were forwarded to the Archbishop of Canterbury, and to her Majesty's Secretary of State for the Colonies, as also a petitiou to the Queen on the same subject. As my opinions in the above matter are unaltered, your Lordship will see that I cannot admit your power to 'cite me formally,' or to 'summon' such an assembly or mixed body of clergy and laity as that referred to. If there were any doubts before on my mind (which there were not) as to the illegality and inexpediency of the synod, those doubts would have been completely removed by a perusal of the 'Acts and Constitutions' of the synod, published by that body, and I have been the more impressed with the conviction that the course which I took was the only one I could consistently adopt as a minister of the Church of England. I cannot, my Lord, recognize a body which has, in my humble opinion, declared its secession from the Church of England in demanding a declaration from Churchmen that they 'are members of the Church of the diocese of Cape Town, in union and full commuuion with the United Church of England and Ireland, and belong to no other religious body.' I do not belong to any religious body in communion with the United Church of England and Ireland, but to the Church of England and Ireland, in the diocese of Cape Town. Further, I cannot recognize a body which has constituted ecclesiastical courts for clergy and laity without the sanction of the legislature; and I cannot but regard the 'act' requiring all newly appointed ministers to subscribe to the 'acts and constitutions' of the synod as a condition of licence in the diocese, as a measure sanctioned neither by law nor usage in our Church, and an unwarranted clog upon a clergyman's liberty unknown in any English diocese. Holding such sentiments, then, your Lordship will perceive that were I to have called a meeting for the election of delegates in my parish, I should virtually have

to acknowledge the 'acts and constitutions' of the synod, part of which are appended to your pastoral, and which as I before stated, I regard as the acts of an illegal body. I have, however, given copies of the documents you sent me to my churchwardens and sidesmen, as the representatives of the laity in my parish, and if they desire to hold a meeting to elect a delegate, or are requested to do so by those whom they represent, I shall not interfere with their liberty; but, for myself, I can take no part whatever in such meeting. In order, however, that my people may know my views by the course which I think it my duty to pursue, I have no alternative but to publish these, my sentiments, as to the subject of this your Lordship's printed circular and pastoral for their information. Regretting, my Lord, that any difference of opinion should exist between myself and my diocesan, and trusting that in firmly expressing my views I have not shown any want of respect to your Lordship, I beg to subscribe myself,

"Most respectfully and obediently yours,

"WILLIAM LONG."

"P.S.—With reference to that part of your Lordship's letter informing me that you propose holding a visitation, I need hardly say that I shall consider it my duty (D. V.) to be present."

The Bishop, in two letters addressed to the plaintiff, bearing date respectively the 30th November and 1st December, urged the plaintiff to give the notice of the meeting of his parishioners to elect a delegate to attend the synod, expressing at the same time his displeasure at the charge of the alleged secession of the Bishop and his brethren from the Church of England, contained in the plaintiff's letter of the 29th November.

Mr. Long replied in a letter, wherein he argued at considerable length the subject of what he alleged to be the point at issue between himself and the Bishop, which may be considered as summed up in the following passage: "With regard to the real point at issue, the unlawfulness of the synod which has not the sanction of the legislature and the crown, and which, so long as the supremacy of the crown is a great constitutional principle in the Church of which we are members, and so long as the acknowledgment of that supremacy is a moral obligation resting, by their vows, upon her bishops and presbyters, I again say that I cannot attend the meeting designated as a synod in

this diocese until it shall be sanctioned by the authorities named. In every colonial diocese where synods are held they have the sanction of the legislature and the crown. Meetings called synods are, I am aware, held in other places, but if they presumed to legislate for the Church, and pass 'acts' such as those which the Cape body has done, and to which I referred in my last letter, and which your Lordship has refused to reply to, or, at least, 'declined to discuss' with me—if, I repeat, they have presumed thus to do these things, without going to the Parliament and the Queen for licence, they are as illegal and unconstitutional as they are here. When, therefore, my Lord, you say 'synods have been held, or are being held, in nearly all colonial dioceses,' it must not be forgotten what other dioceses have done and what they have not done here, namely—gone to the law for permission. There are many dioceses, however, which I could name where no synods with or without law are held in any shape. When, however, these restrictions and prohibitions are withdrawn here by act of Parliament, I shall think it my duty to obey your summons to attend and to call a meeting of my parishioners."

The Bishop replied on the 6th December, by offering the plaintiff a private meeting in the presence of mutual friends, at which the plaintiff might offer, if he pleased, apology or explanation for his conduct; but the plaintiff, in reply, declined this proposal, and reasserted the opinions he had already expressed. The prospect of a healing of the breach between the parties appears to have vanished at this time, as the first passage in Mr. Long's letter is as follows:—

"My Lord,—I have to acknowledge the receipt of your letter of the 6th instant, from the tenor of which I am convinced that nothing I could say or write would lead either of us to take different views from what we now do of the subjects at issue between us. This I regret much; but, for myself, I cannot conscientiously do otherwise. If, from a sense of duty to the Church of which I am a minister, in stating publicly my reasons for not attending your synod, and not giving notice of the same, I have caused offence, I am sorry for it. I could hardly, however, expect that, differing so widely as we do on many important points, we should view things in the same light in this matter. To offend, or judge other people's motives, was certainly not my object. I have already explained this, and disavow any such intention. With reference to the 'declaration,'

I still maintain my opinion that the words, 'I do declare that I am a member of the Church of the diocese of Cape Town, in union and full communion with the United Church of England and Ireland, and belong to no other religious body,' in their strict and grammatical sense, imply virtual secession from, or independence of, the United Church of England and Ireland. I can recognize no other Church and no other declaration than that of 'belonging to the United Church of England and Ireland, in the diocese of Cape Town.' I do not judge the motives of those who sign such a declaration, or require such a declaration from the members of the Church of England, but I repeat my opinion that, 'however unintentionally,' those who subscribe, or desire subscription to it, virtually, by the words, declare that they belong not to the Church of England, but to a Church in union and full communion with the United Church of England and Ireland. If the expression of such an opinion is to be construed into a charge, and to be styled a grave ecclesiastical offence, for which a clergyman may be tried, then it amounts to this, that a clergyman in this diocese is to be deprived of the privileges of a British subject, and the contest between us, my Lord, is nothing less than this—whether a clergyman in the colonies shall or shall not have the same liberty of opinion, and right to express that opinion, which every clergyman in England has—not only as a minister of the Church of England, but as an Englishman. This is a point of such vital importance to the clergy and laity of this diocese that, as my duty to the Church necessitated me to publish reasons for disapproval of your synod, it is still more necessary that the public should see that it is now a struggle for civil and religious liberties. With respect to the notice which your Lordship would desire to compel me to give for the election of a delegate to your synod, and my declining to do which you call a 'violation of my ordination vows,' I have only to say that so long as I am under moral obligation to respect the thirtieth canon, and several of our articles, especially the thirty-seventh, where it is declared that 'the Queen's Majesty hath the chief authority in this realm of England, and other her dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain,' as well as the declaration prefixed to those articles; and so long as your Lordship as a Bishop of the Church of England cannot ordain in this colony without re-

quiring the same obligations from candidates for ordination, I cannot admit the justice of your charge of violating my oath." The letter concludes with a refusal to attend the proposed private meeting for reasons which Mr. Long expressed.

On the 12th December, the Bishop made a further application to Mr. Long, in which the following passages occur:—"I have now resolved, wishing to give you a further opportunity of retracing your steps, to summon you once more to appear before me on Saturday next, at three o'clock, in the cathedral vestry. Another refusal to attend can only be followed by immediate suspension. As you say in your note, which I am now acknowledging, that if in your mode of stating your reasons for not attending the synod you have caused offence, you are sorry for it, and that you did not mean to bring any charge against your Bishop and brethren, I am willing to give you the benefit of your disavowal, and to accept your explanation. I have never, as you well know, interfered with your private opinions, or had any wish to do so. In this case you have, without any call to do so, published to the world what is a not a mere opinion, but a libel. You now disclaim the intention of doing this or of casting any imputation on your Church by the course which you have seen fit to pursue; I will not, therefore, press the point further. The refusal to publish the required notice you still adhere to; and it is for this refusal that I summon you to appear before me on Saturday. Any publication of my private letter to you without my concurrence would be a fresh breach of ecclesiastical discipline."

The plaintiff in reply to this letter says: "I understand your Lordship to say that you do not now charge me with any offence in regard to the mode in which I stated my reasons for not attending the synod. That question is therefore set at rest, and the only one that now remains is, whether I have committed any offence in refusing to give notice for the election of a new delegate. Although I have grave doubts as to my obligation to answer an informal citation for refusing, as I conceive, to break the law and violate the oath of supremacy, yet, since you ground your authority to do so on the Queen's letters patent, and out of respect for your office as a Bishop of the United Church of England and Ireland in the diocese of Cape Town, I shall obey your summons to appear this day at three p.m. in the vestry of St. George's Cathedral, on the charge of refusal to give what I deem an unlawful notice. In answering to the

citation which you make under the letters patent, I am not, of course, coming to any 'private' meeting, to which, for obvious reasons, I strongly object. In expressing my readiness to obey your summons under the authority named, I do so with the distinct understanding that I have the privilege of the presence and aid of any two friends I may choose to bring with me; and, of course, if reporters connected with the public press should desire to be present, your Lordship will not object. I also do so with the proviso that the course of procedure be not opposed to the laws of equity and justice, and that I shall not be placed in a position different from that to which any defendant in a civil or criminal court would be subjected."

The Bishop rejoins as follows:

"Bishop's Court, Dec. 15, 1860.

"REV. SIR,—You again leave me till the last moment without replying to my letter. I have only time to say that you are not in the present state of the proceeding cited to a trial. If I should be compelled to do this, it will be a public one. What I have cited you to do now is to appear privately before me, that you may offer, if you are so inclined, explanations, apologies, or excuses for your conduct, and that I may endeavour to convince you of your violation of your duty to your Bishop and your Church in the course which you have taken. If I could succeed in this, and you should be led by God's grace to see how unjustifiable your conduct has been, I shall be prepared to overlook your fault and forgive you, as I have done before. If not, I shall be compelled to bring you to a public trial. To the private meeting I have told you that you may bring, if you wish it, a friend. As you ask for two, I will allow you to bring two; I will not allow you to bring more, to be present at a private meeting, nor will I allow reporters.

"I am, Reverend Sir, yours truly,

"R. CAPETOWN."

On the same day, the 15th December, Mr. Long attended at the Cathedral, and the defendant then again urged him, but without effect, to give the notice in the terms required, or at least to give the notice, substantially. I appears, however, that Mr. Long's impression was, that he was required to give the notice in its very terms. The Bishop, finding that the efforts made by him to induce the plaintiff to publish the notice

were unavailing, caused the following notice to be served on the plaintiff:

"To the Rev. WILLIAM LONG, &c.

"Please to take notice that you are hereby cited to appear before the Right Reverend Robert, Lord Bishop of Cape Town, on Monday, the 4th of February, 1861, at 11 o'clock a.m., in the vestry of the Cathedral Church of St. George's, Cape Town, then and there to answer for having neglected and refused to obey the commands and directions of your Bishop to give notice of a meeting to be held in certain terms of a letter addressed and forwarded to you, and dated the 1st of October, 1861, with the pastoral issued on the same day, and therein enclosed, in reply to which you did, in a letter dated the 29th of November, 1860, addressed to the said Bishop, refuse to obey, or otherwise carry into effect the directions thus conveyed to you. And though thereafter duly and solemnly admonished by your said Bishop, you still persist in your refusal to give heed to the request, or to obey the directions before stated and referred to.

"By order of the Bishop,
"D. TENNANT, Registrar of the Diocese."

This was accompanied with an intimation that the Bishop intended to invite five clergymen to assist as assessors, and Mr. Long was invited to object to any who were named, if any personal objection existed.

Mr. Long, after a further correspondence with the Bishop's Registrar, appeared under protest at the Cathedral on the day mentioned, and the Bishop having received evidence of Mr. Long's refusal to give the required notice, and the plaintiff having read a letter wherein he justified his refusal on certain grounds which he alleged, the Bishop, on the 8th of February, after hearing the opinions of the assessors, in the presence of Mr. Long, pronounced sentence of suspension against him in the following terms: "Reviewing, then, this whole case as now before me, considering how open, and long continued has been your resistance to lawful authority, how unprovoked has been this contest, how easily it might have been avoided, how fruitless have been the loving efforts made by others whose character and position you cannot but respect, to convince you of the false position you have taken up, seeing that the question which you

have raised is no less than this, whether law and order, or anarchy and confusion, shall prevail in the Church, nay, whether there is any such thing as law amongst us; assured that there can be no doubt that the laws and customs of the Church of England justify your Bishop in the course which he has pursued, the rubric after the Nicene Creed, as I pointed out to you at our meeting, expressly recognizing his authority in this particular matter, and believing that you have no reasonable ground for thinking that you were called upon to do an illegal act, the evidence to the contrary, if you would have discussed the points with your Bishop, being conclusive, I have no alternative left but to pass sentence upon you for your repeated acts of disobedience, and your defiance of the laws of your Church and the authority of your Bishop. I therefore pronounce you suspended from the cure of souls, and from the exercise of all ministerial functions and offices, for a period of three months, from Friday, the 8th of February, 1861, until Wednesday, the 5th of May, 1861, and thereafter, until you shall have expressed regret for your past disobedience, and your willingness to render obedience for the future. I have only to add that as you have a wife and children, I should be sorry to deprive you of any portion of your ecclesiastical income. You will be allowed to receive this, therefore, as heretofore, for the present."

Mr. Long, in contravention of this sentence, continued to perform his clerical functions in the Church of Mowbray, as incumbent thereof, whereupon the Bishop issued the following citation:

"To the Rev. WILLIAM LONG, &c.

"REVEREND SIR,—Please to take notice that you are hereby cited to appear before the Right Reverend Robert, Lord Bishop of Cape Town, on Wednesday, the 6th day of March next, at twelve o'clock noon, in the vestry-room of the Cathedral Church of St. George, Cape Town, then and there to answer for having failed to render due and canonical obedience to your Bishop, and for acting in defiance of the laws of your Church and the authority of your Bishop. In that whereas, after sentence of suspension, *ex officio*, for all and several the acts and omissions therein set forth had been read and delivered in your presence, on the 8th of February instant, by the said Bishop, you did not thereafter refrain, as by the said sentence you were directed and required to do, from the exercise of

clerical functions, but, on the contrary, continued to discharge parochial duties, and to officiate and perform divine service in the church of St. Peter, Mowbray, thereby setting at nought the authority of the Bishop and refusing to give any heed to the said sentence, and which acts and doings were and are, or some or one of them were and are, or was and is, true, public, and notorious. Wherefore the Bishop cites you to appear at the time and place before mentioned, to answer for this your contempt of his authority, and to hear and receive such judgment as he may see right to pronounce and as the exigency of the case may require and authorize. Dated, &c.

"D. TENNANT, Registrar of the Diocese."

A further correspondence then took place between Mr. Long and the Bishop, and Mr. Long intimated that he did not intend to appear to answer the citation, and that, acting on legal advice, he should continue to perform his duties as incumbent of the parish of Mowbray; whereupon the Bishop, on the day named, in the absence of the plaintiff, heard evidence and delivered the following sentence: "It having been proved that the Rev. William Long, after having been suspended from the exercise of all ministerial functions, has, in open defiance to the laws of the Church and of the authority of the Bishop of the diocese, continued to officiate as minister of the parish or district of Mowbray and to celebrate divine service in the church thereof; it having been proved that the said Reverend William Long was duly cited by the Registrar of the diocese to appear before the Bishop in the vestry of the Cathedral Church of St. George's, on, &c.; and the said William Long having, in reply to such citation, addressed a letter to the Bishop, in which he contumaciously refused to appear before the Bishop to answer for his neglect to render due obedience to the sentence pronounced upon him; and the said William Long, after further warning and admonition, having persevered in his determination not to appear;—I, therefore, Robert, by divine permission Bishop of Cape Town, do, for these repeated acts of disobedience and contempt, withdraw the licence of the Reverend William Long, and do deprive him of his charge and cure of souls in the parochial district of Mowbray, and of all emoluments belonging to the same. And I do, moreover, hereby admonish the said William Long not to officiate again in the said church or parish, and warn him that if he should do so after this his deprivation,

he will render himself still further liable to the censures of the Church.

"R. CAPETOWN.

"Cathedral Vestry, March 6, 1861."

It is only necessary to add that it is in evidence that the Bishop was prepared to allow an appeal to the Archbishop of Canterbury, in the terms of the letters patent, against his decision, and to suspend the execution of the sentence in the mean time, if it had been demanded by Mr. Long.

I have stated the foregoing facts fully, although I fear at too great a length, and I now proceed to consider the various questions which have been raised by the pleadings in this case.

The first matter for inquiry is to endeavour to ascertain what legal effects ought to be assigned to the letters patent, because the relative situations of the Right Reverend Bishop and the Rev. Mr. Long cannot be ascertained until this investigation is entered into.

Upon this point it appears to me that, by force of the letters patent of 27th September, 1847, and 8th December, 1853, followed by the acts of ordination and consecration by the Most Reverend the Archbishop of Canterbury, in obedience to the first-named letters patent, the right reverend defendant, Dr. Gray, became and is a Bishop of the see and diocese of Cape Town, and, as such, is entitled to perform all the functions peculiar and appropriate to the office of a bishop in the Christian Church, his authority being nevertheless to be considered, in this Court, as limited to, and extending only over such persons as voluntarily submit themselves to such authority.—In other words, he became and is a Christian bishop, over a voluntary association of persons in this colony, united together in spiritual communion with the United Church of England and Ireland (and therefore, I presume, a part of that Church), and who have agreed, amongst themselves, to maintain its doctrine and discipline.

The recitals and provisions made in the letters patent, and the decision in the Court of Queen's Bench, to which I shall presently refer, seem to me to demonstrate that this is not an inappropriate description of the Bishop's true position.

The first letters patent commence as follows: "Whereas the doctrine and discipline of the United Church of England and Ireland are professed and observed by many of our loving subjects resident in our colony or settlement of the Cape of Good

Hope, and in our island of St. Helena, and our aforesaid subjects are deprived of some of the offices prescribed by the liturgy and usage of the Church aforesaid by reason that there is not a Bishop residing and exercising jurisdiction and canonical functions within the same. And, whereas, for remedy of the aforesaid inconveniences and defects, it is our royal intention to erect the said colony and settlement or island into a Bishop's see or diocese." And then, after founding the see and nominating the Bishop, and commanding the Archbishop of Canterbury to ordain and consecrate him, her Majesty further ordains and declares "that the said Bishop of Cape Town and his successors shall be subject and subordinate to the metropolitical see of Canterbury, and to the archbishops thereof, in the same manner as any bishop of any see within the province of Canterbury, in our kingdom of England, is under the same metropolitical see and the archbishops thereof. And we do further will and ordain that every Bishop of Cape Town shall take an oath of due obedience to the Archbishop of Canterbury for the time being, as his metropolitan, which oath shall be ministered by the said Archbishop, or by any person by him duly appointed or authorized for that purpose."

Again, by the second letters patent the same intention is manifested of providing for the spiritual welfare of the colonists who belong to the United Church of England and Ireland, and the Archbishop of Canterbury, the metropolitan over the see, is the party who represents to her Majesty the necessity of a change in the then existing arrangements. The language used is, "Whereas it has been represented to us by the Most Reverend Lord Archbishop of Canterbury that the said see is of inconvenient extent, and that for the spiritual care and superintendence of the religious interests of the inhabitants thereof, and for the maintenance of the doctrine and discipline of the United Church of England and Ireland within our colony of the Cape of Good Hope," &c. And it is for these reasons that her Majesty is moved to issue the letters patent.

Here we find clearly expressed the objects for which the new sees or dioceses were to be founded. The archbishop had already consecrated Dr. Gray the first Bishop of Cape Town, and the same reverend prelate is now an active and consenting party to a new arrangement, whereby three distinct sees or dioceses were to be created, the former bishop being made metropolitan of these dioceses. And it is further to be observed that

he is thus made metropolitan "subject to the general superintendence and revision of the Archbishop of Canterbury for the time being, and subordinate to the archiepiscopal see of the province of Canterbury." And after certain powers over presbyters are given, upon which I shall comment presently, it is further provided that if any party shall conceive himself aggrieved by any judgment, decree, or sentence pronounced by the bishop, it shall be lawful for the party to appeal to the archbishop.

His Grace the Archbishop of Canterbury has thus, in fact, general superintendence and revision over the acts of the metropolitan, and also over all matters arising between the bishop and any of his presbyters, and these provisions appear to be well calculated to hold these colonial churches together, and to keep them One, in faith, in discipline, and in communion, according to the doctrine and usages of the United Church of England and Ireland—for if a suffragan colonial bishop be subjected to the censure of his metropolitan, or a presbyter to the censure of his bishop, in respect of any spiritual matters, an appeal lies to the Archbishop of Canterbury, whose judgment and decision would be final and conclusive between the parties on all questions referred to him; and thus, questions of doctrine, as well as questions of morals and discipline, would finally be decided by a high spiritual authority, and, his authority being reverently submitted to, the unity of the church would be well preserved.

But although the right reverend defendant has thus been clothed with all the functions peculiar and appropriate to the office of a bishop, within his see, his position in a legal point of view appears to be very different, for many purposes, from that of a bishop of the United Church of England and Ireland. By the laws of England, the jurisdiction and authority of archbishops and bishops depend, not only upon the ancient laws of the Church, but, also upon the laws which have from time to time been framed by Parliament, to meet the exigencies of past ages, when many conflicts had unhappily arisen, between the temporal and the ecclesiastical powers—to say nothing of the great conflict which brought about the Reformation.

It is therefore not surprising that we find many statutes enacted in England, which regulate, restrict and restrain the jurisdiction and powers of the English Clergy; the most important of them being the Act of Submission, 25 Hen. VIII.

c. 19, whereby the clergy are prevented from enacting, promulgating, and executing any new canons, constitutions or ordinances, provincial or other, in the Convocation, unless the King's assent and licence be first had.

We also find many statutes passed, for regulating the proceedings in the ecclesiastical courts, especially as to the mode or manner in which bishops must proceed in these courts against presbyters—the last of which is the late Act 3 & 4 Victoria, c. 86.

It follows from these circumstances that a bishop of the English Church is restrained in all his proceedings by the various provisions which these statutes contain, and if he neglect implicitly to follow them, the temporal courts will interfere, as the Court of Queen's Bench interfered in the case of the Dean of York (2 Q. B. 1), and the Supreme Court of Sydney in the still later case of King *v.* the Bishop of Sydney. The principle upon which these cases were decided is, that if the legislature has assigned a particular forum in which causes are to be tried, any court, otherwise constituted, acts without jurisdiction.

The United Church of England and Ireland is also a State Church. Her archbishops and certain of her bishops sit in the Upper House of Parliament. She possesses large endowments; and the older statutes were founded upon the principle that all the subjects of the Crown were bound to conform to the State religion. More modern legislation has indeed allowed almost entire toleration to her Majesty's subjects in England and Ireland; but the impress of the ancient theory remains on all these older laws, which still regulate the affairs of the Established Church.

That such material differences exist in the position of an English, when compared with that of a colonial bishop, has, as I have already remarked, been decided by the Court of Queen's Bench. That was a case—the Queen *v.* Eton College (27 Law J., Q. B. 132)—wherein it became necessary for that Court to determine whether the preferment which became vacant by the appointment of an incumbent to a bishopric in New Zealand, founded by letters patent, gave the Crown the same rights of patronage as that which attaches when an English incumbent is promoted to a bishopric in the Church of England. The judgment is so valuable, with reference to the novel and difficult questions which are raised in this case, that I may

mention that Lord Campbell, Sir John Coleridge, Sir William Erle, and Sir Charles Crompton were the very eminent judges who decided it, and that the Court took time to consider it very deliberately, after able arguments by Sir Richard Bethell, and Sir Frederic Thesiger.

Lord Campbell, Chief Justice, says, in delivering the judgment of the Court: "There can be no doubt that on the promotion of the incumbent of a benefice in England to a bishopric in England, the benefice is avoided, and it belongs to the Queen to present to the benefice so avoided. The English and Irish bishops hold bishoprics founded and endowed by the Crown. They are prelates of a church which is the established Church in England and in Ireland. They have by law well-defined jurisdictions, and important rights and privileges, both spiritual and secular. The Bishop of Christchurch in New Zealand has nothing in common with them, except that he is a Protestant bishop, canonically consecrated, and of the Anglican Church. We do not question the power of the Queen to create a bishopric in any part of her dominions, except where, as in Scotland, such an exercise of prerogative is forbidden. In a newly-settled colony such an exercise of prerogative is lawful; but we must bear in mind that in such a colony there is no established Church, and that the ministers of religion in communion with the Church of England, with the Church of Scotland, and with the Church of Rome, in the absence of any imperial or colonial legislation on the subject, are all upon an equal footing. If by legislative enactment there were a fund created for the support of 'the Protestant clergy in New Zealand,' according to the opinion given by the judges in the House of Lords upon the Canada reserves, the Episcopalian and Presbyterian clergy in the colony would be entitled to share it in equal proportions. It has likewise been held that the Crown may create an ecclesiastical Roman Catholic corporation in an English colony, as well as a Protestant bishopric. The bishopric of Christchurch in New Zealand has been created purely by the prerogative of the Crown, without any such statute as 53 Geo. III. c. 155; or 3 & 4 Will. IV. c. 85, which authorized the Crown to grant jurisdiction to bishops to be created in India, and to establish a hierarchy in that country, as had been before done in Jamaica and other parts of the dominions of the Crown in the West Indies. We by no means say that the promotion of an English incumbent to be a bishop

in the East or West Indies would give the Crown the right to present to his English preferment; but there is great difficulty in seeing that the Bishop of Christchurch in New Zealand has any jurisdiction, except over those who voluntarily submit to his jurisdiction; and he really seems in this respect to be in the situation of the 'titular bishop,' whose promotion to be a bishop, all the authorities agree, gives the Crown no right to present to his preferment."

Here, then, we find that the jurisdiction of a colonial Bishop (appointed by letters patent in nearly the same form as those by which the Right Rev. Dr. Gray was appointed, over those who submit themselves to it, is clearly and distinctly acknowledged.

The next inquiry must therefore be, whether the Rev. Mr. Long has brought himself within the limitations laid down by Lord Campbell,—that the jurisdiction exists only over those "who voluntarily submit themselves to it;" and upon this part of the case I cannot entertain the slightest doubt. Mr. Long must have been fully acquainted with the various provisions contained in the letters patent for the maintenance of discipline in the dioceses which were founded in this colony. The documents were published in the colonial Gazette, and every clergyman belonging to the Church of England within the colony must be supposed to be well acquainted with their contents. One of the clauses in the fresh letters patent runs thus: "We will and declare that the said Bishop of Cape Town may perform all the functions peculiar and appropriate to the office of Bishop within the said diocese of Cape Town;" and Mr. Long, with full knowledge of these facts, applied to the Bishop under the circumstances I have already detailed, and he was, on his own request, admitted to the holy order of the priesthood, and on his ordination, not only took the oath of canonical obedience to the Bishop, but accepted a licence from him, containing this stringent clause: "We hereby reserving to ourselves and our successors, Bishops of Cape Town, full power and authority to revoke these presents, and all things herein contained, whensoever we shall see just cause so to do." Again, in 1854, when Mr. Long was removed from Graaff-Reinet to Mowbray, he was one of the parties who signed a petition addressed to the Bishop, and thus describing him: "We do therefore here appear as suitors unto you, as God's minister, the Bishop and ordinary of this diocese, that you will decree," &c. At the same consecra-

tion, the oath of canonical obedience was again taken, and a similar revocable licence again accepted by Mr. Long; and then, as if with the very purpose of impressing on the reverend gentleman the consciousness that the Bishop intended to assert his authority within the newly consecrated church, the following clause is to be found in the certificate of consecration: "And we do hereby pronounce and decree the same to be for ever hereafter a church for the public worship of God, the preaching of His holy word, the administration of His holy sacraments, the solemnization of matrimony, and the celebration of all other sacred ordinances therein according to the ritual of the Church of England, and the canons and constitutions of the same church, saving and reserving unto us and our successors, Bishops of Cape Town, all ordinary and episcopal jurisdiction, rights, and privileges."

The proofs, therefore, that Mr. Long has acknowledged the authority and jurisdiction of the right reverend defendant as his Bishop, are full, ample, and complete. In truth, if the Bishop be not a bishop, Mr. Long is not a priest, and he has wrongly stated in the declaration before me, that he was admitted to the holy order of the priesthood, and it was unnecessary for him to refer to the letters of orders to the priesthood, which were attached to the pleadings.

I thus arrive at the conclusion that the status of the right reverend defendant is that of a bishop over the diocese founded by the letters patent, and that the reverend plaintiff, by the laws of the Church, and by contract and agreement, has become and is a presbyter, acknowledging and submitting to the Bishop's authority and jurisdiction.

And then I find that the Bishop *has* exercised authority and jurisdiction over Mr. Long, his presbyter. He first suspended him from his cure of souls for a limited time, and subsequently he has withdrawn his licence and deprived him altogether of his cure, and of all emoluments belonging to the same. It is alleged by the plaintiff in his declaration that, for various specified reasons, these sentences of suspension and deprivation are altogether void and of no effect; and this Court is now called upon to protect Mr. Long from the consequences which will follow from the exercise of the Bishop's authority over him. And the all important question arises—How far ought, or, in other words, how far has this Court authority, to interfere in such a case?

The rule which I find established by the Roman-Dutch law, as it is stated in Van der Linden, book 3, p. 1, sect. 9, is as follows: "Matters which are purely of an ecclesiastical nature must, according to the general rule, be treated according to the law of the Church—that is, first before the consistory, next before the assembly, and lastly before the synod. The temporal judge never interferes his authority further that when, by defect of power in the Ecclesiastical Court, it becomes necessary for him to afford the assistance of the civil arm to put a stop to any improper proceedings; nor does the political power interfere except in the case of religious disputes arising to such a height, as to have a pernicious effect on the public peace and tranquillity, or to affect the government of the Church as by law established."

Here we find a clear and distinct rule laid down which bears directly on the subject under discussion; and, if there were a state religion in the colony, with ecclesiastical courts properly so called, in existence, the only question would be whether this is a matter purely of an ecclesiastical nature. But, although this is not the present state of the colony, there happen to be in existence courts of the same kind as those mentioned in Van der Linden, which have authority and jurisdiction over by far the oldest and largest community of Christians, in this colony. I refer to the courts established by the Ordinance No. 7, 1843, which provides for the government of the Dutch Reformed Church. Amongst the rules and regulations attached to this ordinance, I find rules carefully laid down for enforcing discipline amongst the clergy, and powers to suspend, and powers to deprive them, are clearly given. I may be allowed to remark that we might expect to find such powers reserved in every well-governed Christian community, and it was well said during the argument, that no minister of any religious body holds his position absolutely and unconditionally.

For the sake of illustration, I will cite two or three of the clauses in this ordinance. By section 13 of article 62, the candidate is obliged to make and confirm with his signature the following declaration and promise: "I, the undersigned, admitted by the synod of the Reformed Church in South Africa to the office of public preacher in the Reformed Church, hereby uprightly declare that, both in doctrine and deportment, I will carefully consult the interests of Christianity in general, and of the reformed faith in particular; that I faithfully embrace, and

heartily believe as agreeable to God's holy word, the doctrine contained in the adopted formulas of uniformity of the Reformed Church; that I will diligently teach and maintain these doctrines, and that I will apply myself with all zeal to the advancement of religious knowledge, Christian morality, order and harmony; binding myself by this my signature to all the preceding; and if I should be found to have acted contrary to any part of this declaration and promise, to submit in every respect to the decisions of the proper church courts."

By article 183, section 188, "Complaints against the doctrine of a minister or candidate must contain distinct evidence that he has contradicted or opposed the doctrine which, according to God's holy word, is contained in the received formulas of uniformity of the Reformed Church."

By sec. 189, the modes of reproof which the synod may use are: "1. As regards candidates—(*a*) Suspension from the ministry; (*b*) disqualification for a call to the ministry for a limited time; (*c*) disqualification for an unlimited time; (*d*) entire revocation of the admission to the ministry. 2. As regards ministers—(*a*) Suspension for a limited time, without loss of stipend, further than the payment of the officiating ministers; (*b*) a similar suspension, with entire or partial loss of stipend; (*c*) suspension for an unlimited time, with or without loss of stipend; (*d*) entire deposition:—which last can take place only by the general assembly."

Here we find provisions which appear to me analogous to the subscription and oaths of canonical obedience which are required from presbyters in the Church of England. Now, I ask, if a minister of the Dutch Reformed Church were suspended by the synod, or deprived by the general assembly, to what extent would this Court interfere? I apprehend that the answer is plain. That this Court would not interfere with the decision of the synod or assembly, save only so far as to ascertain that these tribunals had determined on a matter within their respective jurisdictions, and that the proceedings were consonant with real and substantial justice,—such as that the party accused had notice of the charge, and was afforded an opportunity of defending himself from it. If such Courts act within their jurisdiction, and there is no irregularity or fraud in the proceedings, it appears to me that their decision is final, and that this Court has no power whatever to inquire into the grounds of their decision.

The English, Scotch and American authorities support this view of the matter. Lord Coke says: "As in temporal causes the king, by the mouths of the judges in his courts of justice, doth judge and determine the same by the temporal laws of England, so in causes ecclesiastical and spiritual, as, namely, blasphemy, apostacy from Christianity, heresies, schisms, ordering admissions, institution of clerks, celebration of divine service, appeals in ecclesiastical causes, commutation of penance, and others (the cognizance whereof belongeth not to the common law of England), the same are to be determined and decided by ecclesiastical judges according to the king's ecclesiastical laws of this realm."

With respect to the American authorities, I find that in a case relating to the German Reformed Church, cited in Hoffmann, p. 478, Judge Rogers, in giving judgment says: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the Word of God, and the discipline of the Church. Any other than those courts must be incompetent judges of matters of faith, doctrine and discipline; and civil courts, if they should be so unwise as to attempt to revise their judgments on matters within their jurisdiction, would involve themselves in a sea of uncertainty and doubt, which would do anything but improve religion or morals." And Mr. Hoffmann himself says on the same subjects: "Let the sentence of Church judicatures be clothed with the same authority that is accorded to the judgment of all established courts, and with no more. Scrutinize the existence of their jurisdiction as to the party and the cause; demand that due notice shall have been given, and in a mode not alien to civil regulations; and watch that the judgment is unstained with collusion or fraud. On what possible ground of analogy, justice, argument or Christian duty can the civic tribunals require more? If they do, and sanction the investigation of every point involved—of law or of fact, of form or of merits—they will shake the foundation of government in every Church, will bring disrepute upon the administration of its laws, and do dishonour to religion itself."

Thus we find that Lord Coke, Van der Linden, and the able American writer on ecclesiastical law, concur alike in distinguishing the limits to be assigned to the temporal and ecclesiastical courts. I shall only mention one further extract from Lord Coke, who says (4 Inst. 221): "And certain it is that

this kingdom has been best governed and peace and quiet preserved when both parties, that is, when the justices of the temporal courts and the ecclesiastical judges have kept themselves within their proper jurisdictions, without encroaching or usurping upon one another; and where such encroachments and usurpations have been made, they have been the seeds of great trouble and inconvenience."

But it may be said that all these authorities refer to the decisions of ecclesiastical courts, properly so called, or quasi-ecclesiastical courts, and that a difference exists in cases where the decision has emanated, not from an ecclesiastical court duly constituted, but from a domestic tribunal, exercising authority over the members of a body who have agreed to be bound by its decisions. But the case of Dr. Warren *v.* Burton appears to be conclusive on this point. Dr. Warren, an eminent Wesleyan minister in England, had been suspended from his functions as a minister, with valuable preferments attached, by a district committee of the Wesleyan body, and he appealed for redress, first to Vice-Chancellor Shadwell, and afterwards by appeal to Lord Chancellor Lyndhurst. In giving this celebrated judgment, which I have not been able to find in the authorized reports of the day—(I read from Grindrod's Compendium, 408), Lord Lyndhurst said: "It is said that Dr. Warren was harshly treated in not allowing Mr. Bromley to attend with him at that meeting. With that I have really nothing to do. The district committee had a power to regulate their own proceedings. They had a power to do so; and upon whether it was duly exercised or not I wish to give no opinion. Upon whether it was a discreet exercise of the power I also give no opinion; but they did exercise that power, that no stranger should be present. They have authority to do that; and that does not, therefore, render the proceedings illegal or invalid. It is again said that the publication by Dr. Warren of his speech that he delivered in the Conference, with the observations affixed to it, was in reality not an offence,—not an offence entitling this body to exercise the jurisdiction, and that it did not support the charges that were preferred against him, copies of which were handed to me. The evidence did not appear to have been gone into. I presume that was because Dr. Warren was absent and did not attend. Whether it did support those charges or not was a question for the district meeting. I have no jurisdiction with respect to it. A particular tribunal is established by the agree-

ment of those parties to decide a question of this kind. I have, therefore, no authority to say whether within the meaning of the rules of this society this pamphlet was or was not an offence; that was peculiarly for the decision of the district committee. I am, therefore, of opinion, not only that the district committee had the power to suspend, but I am of opinion that they acted legally. I am not called upon to say more. Whether they acted wisely, discreetly, temperately, or harshly, these are matters with which I have no concern, and upon which I desire now to express no opinion. Therefore, upon these two grounds merely, the regularity of the proceedings and being satisfied of the authority of the body, I am bound to affirm the decision in this respect of the Vice Chancellor."

Since Lord Lyndhurst delivered this judgment, the Cardcross case came before the Court of Session in Scotland, on the 19th July, 1861, and Lord Ivory, in delivering an interlocutory judgment, made the following observations with respect to the position of the community known as the Free Church, which seem very appropriate to the present inquiry: "The Free Church, on this question, is in precisely the same predicament with any other dissenting Church, and it is not necessary that that Church should be a Christian Church, in order to entitle them to the freedom and toleration which the law of this country gives to all bodies associated in such a manner, so long as they do not interfere with, or infringe, the public law of the land. It is a very broad question, and it is impossible to approach it without seeing the necessity and propriety of watching over the principles upon which such questions are to be dealt with, because justice demands that the same course shall be followed, and the same judgment pronounced, in regard to the rights of other tolerated bodies as in regard to the rights of this tolerated Free Church. Now, with reference to one and to all, I beg, for my own part, that I be distinctly understood as recognizing the fullest right in the Free Church and other dissenting Churches to deal with their own constitution. They are free, within themselves, to frame their constitution, and to set forth its principles and its limits, and to point out the duties and the course of conduct to be expected within the association. They may hold their own opinions, they may settle their own doctrines, they may regulate their discipline, they may regulate the appointment and the deposition of their officers. They may make what nobody will object to call their own judicatories, and

in certain respects, they are entitled, also, to settle and regulate their own forms of proceeding. All this they may do in the most complete manner, and when they have done so, if they will only add the virtue of remaining together, and not differing and contending with each other, they have the power of doing everything which any person whatever ought to wish, in a free land, to be entitled to do. They may also pronounce their sentences and decrees, and if they pronounce them within the powers given by the constitution, no man will interfere with them, or say that they have done wrong. But if they are not conforming to the constitution,—if they act against the powers which they have vested in their judicatories,—if their sentences are pronounced by those who are not judicatories to that effect, it is a very different affair. Then, what has been so done will have been done so far against law that this Court must be entitled to interfere; and they will do so, because such proceedings will be an infringement and violation of the constitution, without which they cannot exist as a body at all. The moment they proceed beyond the powers vested in their officers, whoever these officers may be within their courts, whatever may be the degrees of subordination and succession of the tribunals, the moment they go beyond the constitution, they are acting *ultra vires*,—they are acting in breach of their own solemn compact; and the proceedings which they thus perform may be quashed and declared to be void. Their sentences and decrees, in such a case, will not be reviewed upon their merits. That has never been hinted at, it has never been attempted, it would be beyond the jurisdiction of this court, or of any other court to interfere as to that. But apart from that, the sentence may be bad for reasons of inherent invalidity, as well as for unsoundness in their reasonings upon which it is propounded. But if the parties have power, by the constitution, to deal with the question, and if they deal with it in the manner pointed out by their constitution, then, although they may err in the conclusions to which they may come, although they may err in the amount of proof with which they are satisfied, or although, in any other manner, they may pronounce an erroneous and unsatisfactory judgment, being within their power, being within that which the defender in the case has submitted to bear at their hands, it will not be interfered with."

The rule laid down so clearly in Van der Linden appears to me, therefore, to be supported in principle by the decisions in

the English, Scotch, and American Courts; and as the dispute between Mr. Long and his Bishop was purely of an ecclesiastical nature (for many cases have decided that a temporal loss attached to a spiritual cure of souls, does not bring in the authority of the temporal courts,—see the Dean and Chapter of Chester's case, 15 Q. B. 515, 19 Law J., Q. B. 425), and following exactly the course taken by Lord Lyndhurst, I proceed to inquire:—1st. Whether the bishop had power, by virtue of his office, to suspend and deprive Mr. Long, one of his presbyters.—2nd. If he had such power, whether he has regularly exercised it in the present instance.

That a bishop has always had power to suspend and deprive his presbyters appears to me to be without doubt. In Godolphin's *Abr.* "Bishop, or episcopus," is thus defined: "An overseer or superintendent, so called from that watchfulness, care, charge, and faithfulness, which by his place and dignity he hath and oweth to the Church, a word which all antiquity hath appropriated to signify the chief in superintending over the whole Church within his diocese, wherein are divers inferior pastors."

Hooker, in a passage cited by the right reverend defendant says: "A bishop is a minister of God, unto whom, with permanent continuance, there is given not only power of administering the word and sacraments, but also a further power to ordain ecclesiastical persons, and a power of chiefty in government over presbyters as well as laymen, a power to be, by way of jurisdiction, a pastor even to pastors themselves." And again (sec. 3), "This we boldly therefore set down as a most infallible truth, that the Church of Christ is at this day lawfully and so has been since the first beginning, governed by bishops having permanent superiority and ruling power over other ministers." And (sec. 4), "The apostles have their successors upon earth, their true successors, if not in the largeness, surely in the kind of that episcopal function whereby they had power to sit as spiritual ordinary judges both over laity and over clergy where Christian churches were established." And (sec. 4), "The bishop's pre-eminence, we say, therefore, was two-fold. First, he excelled in the latitude of the power of *order*; secondly, in that kind of power which belongeth to jurisdiction." And again, "Touching the other part of their sacred function wherein the power of their jurisdiction doth appear, first, how the Apostles themselves, and secondly, how Titus and Timothy had rule and jurisdiction over presbyters, no man is ignorant. And had not

Christian bishops afterwards the like power?" And again (sec. 18), "It doth not suffice that the lord of an household appoint labourers what they shall do unless he set over them some chief workman to see they do it. Constitutions and canons made for the ordering of church affairs are dead task-masters. The due execution of laws spiritual dependeth most upon the vigilant care of the chiefest spiritual governors, whose charge it is to see that such laws be kept by the clergy and people under them. With those duties which the law of God and the ecclesiastical canons require in the clergy, lay governors are neither for the most part so well acquainted, nor so deeply and nearly touched. Requisite, therefore, it is that ecclesiastical persons have authority in such things, which kind of authority maketh them that have it, Prelates."

Bingham, in his "Antiquities," vol. 1, p. 60, says: "I come now to consider the episcopal office and function itself, where, to do justice to antiquity, it is necessary for me to observe a three-fold distinction between bishops and presbyters in the discharge of ecclesiastical offices for, 1st, In the common offices which were ordinarily intrusted in the hands of presbyters, such as preaching, baptizing, administering the eucharist, &c., there was this obvious difference betwixt a bishop and a presbyter, that the one acted by an absolute and independent power—the other in dependence upon and subordination to his bishop, by whose authority and directions, under God, he was to be governed, and do nothing without his consent or against it, so that, though there was no difference in the things that were done, yet there was an essential difference in the power of doing them. This is an observation not commonly made; but it is of very great use both for establishing the just bounds of episcopal and presbyterial power, and clearing the practice of the primitive Church. 2ndly, Some offices were never intrusted in the hands of presbyters; nor allowed if performed by them, such as the ordination of bishops, presbyters, &c. 3rdly, Bishops always retained the power of calling their presbyters to an account, and censuring them for their misdemeanors in the discharge of their office; which presbyters could not do by their bishop, being always subject and subordinate to him as their superior. These things cleared and set in a fair light will give us a just account of the offices of a bishop, as distinct from that of a presbyter in the primitive Church." Again, p. 71, "Yet it must be owned that according to the discipline and custom of those times,

bishops seldom did anything of this nature without the advice and consent of their presbyters, who were their assessors, and as it were the ecclesiastical senate and council of the Church; and here it is to be further noted out of the preceding clauses that if any clergyman thought himself injured by his bishop he had liberty to appeal either to the metropolitan or a provincial synod."

In truth, authorities without end could be multiplied on this point, and many of them were cited by the right reverend defendant, in the course of his very able and learned argument. I cannot for a moment doubt that a bishop of the Christian Church may suspend or deprive a presbyter. "Order is Heaven's first law," and surely we must expect to see it maintained in every branch of Christ's Holy Church. Wisely and beautifully it has been said,—

> "Take but degree away, untune that string,
> And hark what discord follows."

The next inquiry is whether the Bishop regularly exercised his power in the present instance. It has scarcely been contended that he was bound to observe any of the directions contained in the statutes in force in England, relative to the discipline of the clergy, when he took these proceedings against Mr. Long. Neither was there any statute or ordinance in existence in this colony, which required him to shape his course of proceeding in any particular manner. He was, therefore, at liberty to proceed *in foro domestico* (see the cases cited at great length in Dean of York *v.* Archbishop of Canterbury, 2 Queen's Bench, 1); and upon each occasion he gave Mr. Long formal notice of the complaints which he alleged against him, and full opportunity was afforded that reverend gentleman to make his defence, if he had been minded so to do. No injustice appears to have been done Mr. Long in this respect. The course to be taken in case of deprivation is thus laid down in Burn's Ecclesiastical Law: "In all causes of deprivation of a person actually possessed of a benefice, these things must concur: 1. A monition or citation of the party to appear. 2. A charge given him, to which he is to answer. 3. A competent time assigned for the proofs and answers. 4. A liberty for counsel to defend his cause, and to except against the proofs and witnesses. 5. A solemn sentence after having all the proofs and answers. These are the fundamentals of all judicial proceedings in the ecclesiastical courts, in

order to a deprivation. And if these things be not observed, the party hath just cause of appeal, and may have a remedy by a superior court."

It therefore appears to me that Mr. Long had the opportunity of making his defence, as completely as if he had been summoned before an ecclesiastical court in England. And it has also been proved that if he had noted an appeal to the Archbishop, the Bishop was prepared to allow it, and to suspend the execution of his sentence of deprivation.

But it is alleged that Mr. Long was in the first instance suspended, because he refused to comply with an unlawful demand made upon him by the Bishop, to convene an illegal assembly. And, no doubt exists in my mind, that if this allegation could be maintained, the Bishop would then be shown to have exceeded his authority and jurisdiction, and the power of this Court to interfere would arise. But I am clearly of opinion that there was nothing illegal in the proceedings which the Bishop wished to initiate, with respect to the assembling of a diocesan synod or assembly. The Bishop was of opinion that synods are the Church's representative bodies, having authority to regulate her internal affairs, and to make laws concerning spiritual and other matters. I am not aware of the existence of any law in force in this colony, which prohibits such an assembly here; and even in England, diocesan synods appear to be lawful assemblies. The Statute of Submission of Henry VIII. has reference to the assembling of Convocation only, and to legislation, by that body, for the Church. It appears to me, therefore, that it was competent for the Bishop to summon his clergy and laity to assemble, to take counsel together, on the affairs of their Church, and by agreement to do anything which it was lawful for them to do; but it does not therefore follow, that it would be competent for them, by virtue of mutual consent, to do anything of an illegal nature, or anything which would in the slightest degree affect or impair the law of the colony, as it is administered in this Court. For instance, I consider that the letters patent would not authorize the establishment by the synod, in this colony, of Ecclesiastical Courts, with a coercive jurisdiction; but, as that power has not been claimed by the right reverend prelate, I do not consider it is necessary to say more on that point.

I have only to add that when the prohibition was applied for, upon which these proceedings are founded, I was against grant-

ing it,—because I held the same opinion on this all-important question then that I have endeavoured to express to-day; and if my opinion proves to be correct, the result will be, that in this colony—every church and community will be allowed self-government, and to manage its own internal affairs without the interference of this Court, provided only that its proceedings, rules and regulations are not illegal, or calculated to impair the security, peace and tranquillity, which now happily prevail.—On these grounds I am of opinion that the judgment should be for the defendant in convention, and, except as to part, for the plaintiff in reconvention.

W. HODGES.

MR. JUSTICE BELL.

THE occurrence of this dispute between the plaintiff and the defendant is infinitely to be regretted. I fear it has given a wound to the Church of England, popularly so called, in this colony, which the decision of this Court, whatever the nature of it may be, is not likely to heal. This is the more to be regretted, because as it had not its origin in any difference about religious faith or doctrine, there is every reason to think that, with the exhibition of a little more forbearance and good feeling than seems to have been shown, the original matter of dispute might have been adjusted without the scandal of an appeal to a court of law by one clergyman against another in order to avoid the still greater scandal of a collision between them in the place of worship.

The dispute had its origin in the simple circumstance of the defendant having required the plaintiff to give notice in his Church of a meeting of those attending it, for the election of delegates to a synod, which the defendant had by a pastoral letter intimated his intention of holding within the diocese. The plaintiff considered that the holding of the synod was illegal, and that the defendant had no power to require him to take a part in the calling of it, or jurisdiction to punish him for refusing to take such part. The defendant, on the other hand, holding the opposite of these opinions, suspended the plaintiff from performance of the functions of his office; and the sentence of suspension being disregarded, finally deprived the plaintiff of his office in the ministry altogether. As the necessary consequence was to withdraw from the plaintiff all enjoyment of the temporalities of his Church, which were the means of support for himself, his wife, and his children, the plaintiff applied to this Court to have the defendant interdicted from hindering him in the performance of his clerical duties as incumbent of St. Peter's, Mowbray, and from disturbing him in the enjoyment of the emoluments of that incumbency. A rule *nisi* was granted in the first place; and thereafter, on hearing the parties, this Court, while it sustained in the meanwhile the prohibition to preach implied in the sentence of deprivation, continued the interdict against interference with Long's enjoying the emoluments of his

incumbency until the rights of the parties should have been ascertained in an action of a declaratory nature, to be brought by Long. That action was brought, and, after pleadings had been filed and such evidence had been led as the parties were advised to bring, it was set down for hearing. Before disposing of the many questions raised by the pleadings, and in the course of the very long but able arguments which were addressed to us, I shall take a cursory view of the plaintiff's and the defendant's introduction into the colony, and of their relative position in their respective characters of bishop and presbyter, previous to the occurrence of this difference between them.

After the cession of the colony to the British Government many persons, who, in England, had been members of the Church of England, came to reside permanently in the colony. These persons were dependent for ministration of the offices of religion, according to the ritual of the Church of England, upon the occasional and accidental arrival of clergymen within the colony, for a stay of greater or less permanency, according to the private and personal objects of these individuals.

Apparently to supply this want of clergymen of the Church of England in this as well as in other colonies, an Act was passed by the Imperial Parliament, viz.—59 Geo. III. cap. 60, whereby the Archbishops of Canterbury and York and the Bishop of London were empowered to admit persons to the order of priest or deacon, "for the cure of souls in his Majesty's foreign possessions." In the month of October, 1844, the plaintiff was ordained a deacon under this statute, "according to the manner and form prescribed and used by the Church of England, for the cure of souls in her Majesty's foreign possessions," without further mention of the locality in which he was to perform his vocation. After having been so ordained in England, the plaintiff came to this colony. In 1845 the Governor for the time, who, by the royal authority, had "the power of collating to benefices, granting licences for marriage, and probates of wills, commonly called the office of ordinary," appointed the plaintiff to be minister of a church at Graaff-Reinet, observing the ritual of the Church of England, and there the plaintiff for some time discharged the offices of religion to the congregation attending his church, without further authority or licence from any one.

Although the Act of the 59 George III. cap. 60, had, in some degree, provided for the religious wants of persons of the Church of England, who had emigrated to the colonies, still no provision

had been made for the celebration to them of the sacraments, for admission of their children to the Church by confirmation, or for the ordination, as clergymen, of persons already in the colony who might be desirous of entering the Church, and of ministering to such congregations as might be brought together; for these purposes the agency of a bishop was necessary. The want of such a dignitary was felt, at the same time, in some of the Australian colonies, as well as in this colony. In consequence, the Crown resolved on creating several colonial bishoprics, as had previously been done in regard to Jamaica, Tasmania, and other colonies. At the time this idea was entertained, a complaint by certain of the colonists of Tasmania against the powers which had been inserted in the letters patent appointing the bishop of that colony, were under consideration of the Home Government.

Many years previously the Crown had granted letters patent creating the See of Jamaica, whereby it gave the Bishop power to visit the clergy of his diocese, and "all manner of jurisdiction, power, and coersion ecclesiastical," and to inquire "by witnesses to be sworn in due form of law," "and by all other lawful ways and means by which the same might by law be best and most effectually done, as well concerning their morals as their behaviour in their said offices and stations respectively, as also to administer all such oaths as were accustomed to be taken in ecclesiastical courts," "and to punish and correct the aforesaid rectors, &c., according to their demerits, whether by removal, deprivation, suspension or other such ecclesiastical censure or correction as they might be liable to, according to," &c. The letters patent then gave a right of appeal to "us, our heirs," &c. "in our High Court of Chancery of Great Britain, to be heard before commissioners to be appointed under the Great Seal."

The Bishop of Jamaica does not appear to have felt himself justified in acting upon the powers given him by those letters patent, without having the sanction of the local legislature of the island; for an Act of the island was passed (6 Geo. IV. cap. 17), declaring that "the laws, ordinances and canons ecclesiastical in force in England should have force in the island, so far as regarded the clergy, and that sentences passed under the letters patent should have the same force as decrees of the ecclesiastical courts in England."

In framing, subsequently, letters patent for the See of Tasmania, the officers of the Crown had followed the model of those

for the See of Jamaica; but the sanction of the local legislature to them had not been obtained by the Bishop of Tasmania, as in the case of Jamaica; either it had not been asked, or, if asked, it had been refused. In these circumstances, the Bishop of Tasmania, desiring to exercise the jurisdiction given to him by his letters patent, summoned before him as witnesses persons who were not clergy of his diocese, or even members of his Church. These persons petitioned the Crown against the power to summon them as witnesses, and prayed that "so much of the letters patent as was repugnant to their rights and privileges" might be repealed. The Secretary of State referred the application to the law advisers of the Crown; and at the same time forwarded to them drafts of letters patent proposed to be issued for the erection of five new bishoprics, of which the colony of the Cape of Good Hope was to be one. The Crown lawyers in due time reported that her Majesty had "no authority by letters patent to create the ecclesiastical jurisdiction complained of, and that therefore the objections were well founded." They further reported that they had "altered the proposed letters patent creating new bishops, although we are aware it is not desirable to have patents for the same object in different forms."

The alteration which was made in these drafts appears to have been the withdrawal of the words, "all manner of jurisdiction, power, and coercion ecclesiastical;" of the power to summon witnesses and administer oaths, and of the power "to punish and correct, by removal, deprivation, suspension or other ecclesiastical censure or correction;" leaving the bishop power to visit and call before him his clergy, and to inquire concerning their morals, with a power to appoint subordinate officers for that purpose; and to the clergy an ultimate appeal from "the judgments, decrees or sentences" of these officers to the bishop in person, and from "any judgment, decree, or sentence" of the bishop to the Archbishop of Canterbury, "who shall finally decide and determine the said appeal." In the letters patent for Tasmania the appeal was to the Crown, in its High Court of Chancery, as it had been given in England by a statute of Henry VIII.

On the 25th September, 1847, letters patent in this amended form were issued, erecting this colony and the island of St. Helena into a bishopric, and appointing the defendant to be the bishop. The introduction or preamble of these letters is not un-

important. It is—"Whereas the doctrine and discipline of the United Church of England and Ireland are professed and observed by many of our loving subjects residing in our colony or settlement of the Cape of Good Hope and in our island of St. Helena, and our aforesaid subjects are deprived of some of the offices prescribed by the liturgy and usage of the Church aforesaid, by reason that there is not a bishop residing and exercising jurisdiction and canonical functions within the same: and whereas, for remedy of the aforesaid inconveniences and defects, it is our royal intent to erect the said colony or settlement and island into a bishop's See," &c. Such being the ground assigned by the preamble for the issue of the letters patent, the powers given by the instrument were—"to perform all the functions peculiar and appropriate to the office of a bishop;" to "give institution to benefices;" to grant licences to officiate to all rectors, curates, ministers and chaplains of "all the churches, chapels or other places" within the diocese "wherein Divine service shall be celebrated according to the rites and liturgy of the Church of England;" to visit all rectors, curates, ministers and chaplains, and all priests and deacons "in holy orders of the United Church of England and Ireland;" to call these functionaries before him, and "inquire concerning their morals and their behaviour in their offices and stations, subject, nevertheless, to such rights of review and appeal" as were afterwards given; to appoint certain dignified officers to assist in the exercise of the episcopal jurisdiction and functions, with a declaration that it should be lawful for any party against whom "any judgment, decree or sentence" should be pronounced by these officers "to demand a re-examination and review of such judgment," &c., &c., before the bishop in person, who should have power "to affirm, reverse or alter the said judgment," &c.; but if any party should conceive himself aggrieved by any judgment pronounced by the bishop, "either in case of such review, or in any cause originally instituted" before the bishop, it should be lawful for the party "to appeal to the Archbishop of Canterbury, who shall finally decide and determine the said appeal."

The defendant arrived in the colony with these letters patent on the 20th February, 1848, and they were advertised in the *Government Gazette* of the 24th February, 1848. At the time of the defendant's arrival there were already in the colony, besides the plaintiff, several clergymen who, like him, had received

colonial appointments, accompanied with a certain fixed salary, and who, like him, had hitherto been performing all their clerical duties by virtue of that appointment alone. According to the evidence of the Rev. Mr. Fry and of Canon Judge, it appears that the defendant made it an object, soon after his arrival in the colony, to prevail on these clergymen to accept from him revocable licences for the discharge of their duties. According to the evidence of Canon Judge, he "received a licence" from the defendant; although he "had not had any licence of any kind" hitherto, he "made no objection to receive it." According to the evidence of Mr. Fry, "when the Bishop came I took a licence as all the other ministers did, not wishing to be singular. At first I objected to receive it, on the ground that it was unnecessary;" "but I took it because Mr. Newman wished me to do so." "Mr. Newman was afterwards Dean of Cape Town. He and I both thought the licence was not necessary, because we had our appointments. He at that time was curate of St. John's. I never read the licence until the other day." Canon Judge and Mr. Fry were, I think, the only persons examined on this subject of licences, and from their evidence it would appear that, so far as regarded such of the clergy as already had appointments, the acceptance of a licence from the defendant was pressed upon them by the defendant. At all events, licences were not asked of him by these clergy, and they were accepted by these two gentlemen more for the sake of conformity with those who had already been induced to accept them than from anything else.

With regard to the plaintiff, he, shortly after the defendant's arrival, applied to him to be admitted to priest's orders. As yet he was only in deacon's orders. The defendant complied with this application, and, on the 15th October, 1848, admitted the plaintiff to the priesthood, "according to the manner and form prescribed and used by the Church of England, he having subscribed to the Thirty-nine Articles of Religion, *i.e.*," of the Church of England, and having likewise taken the oath appointed by law to be taken, instead of the Oath of Supremacy to the Crown of England, and of canonical obedience, by which the plaintiff swore, "I will pay true and canonical obedience to the Lord Bishop of Cape Town and his successors, in all things lawful and honest." At the same time that the defendant admitted the plaintiff to the priesthood, he issued to him his letters

of licence, giving him "our licence and authority to officiate and have the cure of souls in the parish of Graaff-Reinet, in reading the Common Prayers and performing other ecclesiastical duties belonging to the said cure, according to the form prescribed in the Book of Common Prayer, and administration of the sacraments, and other rites and ceremonies of the Church, according to the use of the United Church of England and Ireland." Whether such a licence was necessary for the plaintiff in his then position, and whether the issuing of it was made a condition precedent to his admission to the priesthood, or whether nothing was said upon the subject, and the licence was received by the plaintiff, as it had been by the other clergymen, as a piece of innocent supererogation, the acceptance of which could do no harm, while the refusal of it might be distasteful to their Bishop, does not appear, and it is not necessary for me to inquire.

On the 23rd November, 1853, the defendant, in order to the division of his See into three Sees, and the nomination of himself as Metropolitan of the whole, "'resigned, yielded up, and surrendered and vacated,' his bishopric, and all and singular the rights, privileges, members, and appurtenances thereunto belonging," into the hands of the Archbishop of Canterbury, and on the 8th December following, fresh letters patent were issued, dividing the See which the defendant had previously held into three, viz.: Cape Town, Graham's Town, and St. Helena; appointing the defendant bishop of the reduced See of Cape Town, creating him metropolitan of the whole three Sees, and giving him, as to Cape Town, the same power, *ipsissimis verbis*, which had been conferred on him by the letters patent of 1847.

In January, 1854, the defendant returned from England to the colony, and in the month of February following the fresh letters patent were advertised in the *Government Gazette* of the colony.

Some time before the year 1853, a Mr. Hoets erected a building in the village of Mowbray, in which he, as a clergyman of the Church of England, ordained in England, I believe, performed divine service, according to the ritual of the Church of England. For some reason or other, Hoets desired to make over this church to the See of Cape Town, reserving the right of patronage generally to himself for his life; ultimately he agreed to restrict the reservation to the lives of two nominees,

the plaintiff, Long, being the first. This, after some correspondence, was carried out by a contract between the defendant and Hoets, executed on the 2nd of June, 1854. In this contract it is stated that the building was intended to be a "church for the worship of Almighty God, according to the liturgy and ritual of the Church of England," and that Hoets had already transferred it to the defendant and his successors in trust to be used "as the parish church of Mowbray." The defendant covenanted by the deed that the church should be held "as and for the parish church of Mowbray;"—on the other hand, Hoets covenanted to pay £100 annually "to the clergyman or incumbent" to be appointed to the church "during the incumbency of the first two incumbents thereof." In consideration of this, the defendant covenanted with Hoets and his heirs that upon their "presentment and nomination" of a person "in full communion with the Church in the diocese of Cape Town," or if resident in England, "with the established Church," "to admit, institute, and appoint" unto the said endowment and into the spiritual charge and care of the said church such person "as the first incumbent of the said church and parish: and so in like manner upon the death, resignation, or removal for any lawful cause of the said first incumbent" of another person "as and for the second incumbent of the said church:" "subject, nevertheless, during the said first and second incumbencies to all such conditions and limitations, under rights of patronage and presentment to benefices as in England are exercised and held by the lay patrons thereof."

Whether Hoets formally nominated and presented the plaintiff to the defendant does not appear; but the correspondence between the defendant and Hoets and the plaintiff before the date of the contract shows that the defendant was aware that the plaintiff (Long) was intended to be the first incumbent, and that the defendant accepted him as such. On the 3rd of June, 1854, the day after the date of the contract, the defendant issued letters of licence to the plaintiff, in the precise terms of those which he had issued to him in 1848, in regard to Graaff-Reinet. There is no mention in the contract with Hoets of letters of licence being either necessary or as being intended to be issued, and there is no evidence how they came to be issued. On the same day a petition, signed by the plaintiff and by a variety of the inhabitants of the village of Mowbray, was presented to the defendant, praying him to consecrate the church given by Hoets

for worship, "in exclusive connection with the church in the diocese of Cape Town, of which your Lordship" is Bishop. On the 6th of June, 1854, the defendant consecrated the church by the name of "St. Peter's, Mowbray," for worship, administration of the sacrament, and celebration of the holy ordinances, "according to the ritual of the Church of England, and the canons and constitutions of the same Church." On the same day, the 6th of June, 1854, the Bishop preached in the newly consecrated church, and introduced the plaintiff to the congregation in these words: "From this time forth you will have your parish priest, one who, having been made to bear his cross and disciplined in the school of affliction, has been led to realize for himself the vanity and emptiness of earthly things," &c.

Thenceforth, the plaintiff officiated as the parish priest of St. Peter's, Mowbray, performing all the functions of that office, and drawing all the emoluments appertaining to it, until he was disturbed by the proceedings of the defendant, out of which the present case has arisen. To resume, then, the history of these matters where I broke off, to speak of the plaintiff's position in his church, it would appear that, between the period of the defendant's arrival and the year 1851, several meetings of the clergy of the defendant's diocese took place from time to time within his house here and at Graham's Town. These meetings were brought together by the defendant, for the business of the Church, it may be presumed, but what particular business they transacted does not appear, nor is it material to inquire. The defendant says they were diocesan synods, and that minutes of their proceedings as such were duly preserved. The plaintiff does not quarrel either with the fact or with the name, and it is not alleged by the defendant that the plaintiff ever refused to attend any of these meetings when summoned; indeed, the defendant uses it against the plaintiff refusing to give notice for a synod of a different kind that the plaintiff did attend one of these synods of the clergy alone, on the 12th of October, 1848.

Whether these meetings of the clergy alone were continued after 1851, I do not know; but in that year the defendant seems, from obvious reasons, to have entertained the notion of inviting meetings, not of the clergy alone, but of the clergy in conjunction with the laity. Accordingly, in the year 1851, the defendant addressed a pastoral to the laity as well as to the

clergy of his diocese, suggesting the propriety of synods in which both of these bodies should take common action. It may be conjectured that this scheme did not meet with such universal acceptance as made it likely to succeed. At all events, the scheme was not then carried out. The defendant seems to have expected that an imperial act of Parliament would be passed legalizing synodical action in the colonies generally. Such an act, after having been "considered at many meetings" of the "whole English Episcopate," was brought into Parliament, where it was discussed during, I believe, three several sessions. Ultimately, the bill passed through the House of Lords, but it was thrown out in the Commons: the defendant says, 1st. Because it was unnecessary, no reasonable doubts existing as to the lawfulness of diocesan synods; secondly. Because legislation would interfere with the rights and functions of the colonial parliaments; and, 3rdly. To do so would give the Church a legal status above that of other religious bodies in the colonies.

With this failure of the first attempt at imperial legislation, all idea of accomplishing the object in that way was abandoned. We learn this from the letter of the Secretary of State to the Governor of Canada on the 15th of February, 1856. The defendant then resumed action within the colony, but instead of readopting the mode of suggestion and invitation which he had used in 1851, the defendant, on the 15th November, 1856, issued a pastoral to "the clergy and lay members of the Church in the diocese of Cape Town," in which, after setting forth his own opinion as to the necessity for a synod, the defendant said, "I have resolved to invite my brethren of the laity, as well as the clergy, to sustain their share of the duties which belong to them in the Church of God. That such is the course which I ought to pursue, and indeed the only course which I could pursue, I can have no doubt." A note to the same passage informed the reader that the Queen in Council had approved of a bill framed by the Melbourne synod and passed at their request by the colonial legislature, and that the Secretary of State had pointed out this as the proper course for the Canadian Church to pursue. The pastoral then invited each "parish or congregation" to elect delegates—declared who should be qualified to be electors and delegates, pointing out the distinction between communicants and confirmed and enrolled

adults, or "true members of the Church," who alone were to be delegates, and those who should merely "declare themselves to be members of the Church of England, and of no other religious denomination," who were to be electors only; intimated that duly licensed priests would be summoned, but deacons, though authorized to attend and speak, would not be allowed to vote; and that the body would be competent to deal with all matters, "except those of faith and doctrine." The pastoral informed its readers, "In calling together the Church by its chosen representatives, I shall take for my guide the bill prepared with great care at repeated meetings by the bishops of the Church in England under the presidency of the Archbishop of Canterbury."

As the pastoral is silent about applying to the Colonial Parliament to sanction the proceeding of the synod, I presume the defendant had come to differ from the opinion delivered by the Secretary of State to the Canadian Church, that such was the proper course to pursue, and had resolved to carry out synodical action without the aid either of the imperial or of the colonial Parliament; and, as the result has shown, he seems still further to have arrived at the opinion that his letters patent did not require the sanction of the local legislature, as the Bishop of Jamaica had supposed in his own case; that, notwithstanding the objections to the coercive powers in the letters patent of Tasmania, the allowance of these objections by the Crown, and the excision of these powers from his own letters patent, he, nevertheless, possessed the powers, either by force of the letters patent or in virtue of powers inherent in his office of a bishop; and that, so far as his clergy are concerned, he should be able to overcome any obstacle which they might offer to the working out of his design for the introduction of synodical action into the colony, *proprio vigore*, without parliamentary aid, either imperial or colonial.

At the same time that the defendant issued his pastoral he wrote the plaintiff, requesting him to give notice of a meeting of those attending his church for the election of delegates from the laity to the proposed synod, and summoned the plaintiff himself to attend the synod personally. The plaintiff called the meeting of his parishioners, as he had been requested, and it took place on the 22nd December, 1856, when it was resolved "that no delegate be elected to represent this parish, and this meeting is opposed to the establishment of a synod in this diocese." Forty-

eight of the parishioners, moreover, not only protested against the synod, but requested the plaintiff "to take no part therein." The members of the plaintiff's church were not singular in the course they thus adopted, for the same in substance, if not in form, was pursued by the congregations of Trinity Church, Cape Town, and St. Paul's, Rondebosch, two of the largest and most influential congregations in the diocese, exceeded in these respects, if they were exceeded, only by the congregation of the Cathedral Church; and I believe the holding of synods was repudiated by one or two other congregations. The clergyman of St. Paul's, Rondebosch, Mr. Fry, did not attend the proposed synod, neither did Mr. Lamb, the clergyman of Trinity Church, except for the purpose of handing in a protest against its legality. In doing this, Mr. Lamb was accompanied by the plaintiff, who withdrew with him from the meeting so soon as the protest had been given in.

The meeting of clergymen and laity which was held on the 21st January, 1857, disregarded that protest, and the absence both of the clergy whom I have mentioned and of delegates from their congregations. It deliberated not the less, and finally adopted what have been produced to us under the title of "The Constitutions and Acts of the first Synod of the Diocese of Cape Town." The first chapter is headed "Declaration of Principles," and begins: "We, the Church of the diocese of Cape Town, in synod assembled." Among other things, it was resolved that nothing in the declaration of principles was intended to affect or change the position of the Church of this diocese, or the relation of its members towards the United Church of England and Ireland, and that the Church of this diocese remains, as heretofore, an integral portion of the Church of England. I may observe, in passing, that hitherto the Church had been called "the church *in* the diocese," &c., and now it is "the Church *of* the diocese," and that Church is declared to be an integral portion of the Church of England; *i. e.*, a portion of a whole of which the parts are several and distinct, and may subsist apart; in other words, the Church of England is composed of so many dioceses, of which the diocese of Cape Town is one, if I understand rightly the expression "integral portion." The second chapter is entitled "Constitution of the Synod," which is declared to be of the bishop, clergy, and laity of the diocese. What clergymen are to be members is stated. It is then said that the laity are to appear by representatives, who are to be communi-

cants, while the electors of them may be persons who have signed a declaration of Church membership. The fifth article declares that when the Bishop gives notice of a new synod the ministers of the several parishes shall give notice for the election of new lay delegates; and the sixth article, that "on some Sunday or other convenient day during divine service, each minister shall give notice of the day and place of meeting for such election in his parish or district," and a schedule to this chapter gives the form of declaration of church-membership by lay electors in these word, "I do declare that I am a member of the Church of the diocese of Cape, in union and full communion with the United Church of England and Ireland, and that I belong to no other religious body." Here the Church is not "in" but "of" the diocese, and is not any integral portion of the Church of England, but a distinct Church in union and full communion with it; unless it can be said of the diocese of London that the Church in that diocese is the Church of that diocese, in union and full communion with the Church of England. The 8th chapter is entitled "Induction and Institution of Clergy." The first article declares, that every presbyter admitted to a cure shall be called rector, and the second, that the rector nominate shall be admitted in the manner in which incumbents (the very term I may observe used to designate the plaintiff's office in the contract with Hoets) are admitted in the Church of England; and the fifth article, that "all presbyters and deacons before induction and institution, or before receiving a licence from the Bishop, and, as a condition of receiving such induction, institution, or licence, shall sign the following declaration, namely 'I do declare that I will submit to all the rules and constitutions enacted by the synod of the diocese of Cape Town.'"

No notice, so far as appears, was taken by the defendant in 1857, either of the protest served by Lamb, in company with the plaintiff, against the legality of the synod of that year, nor of the departure of Lamb and the plaintiff from attendance at its meeting. Nothing more takes place until the 1st of October, 1860. On that day, the defendant wrote the plaintiff a letter beginning thus, "I forward herewith some copies of a pastoral letter addressed by me to the diocese for distribution in your parish. You will see from it that I have summoned a synod for the 17th January, 1861. You will be good enough to consider this present note as your formal citation to the synod." In the pastoral, copies of which accompanied this letter, there

was this passage: "The elections in each parish will take place on Saturday, the 8th of December, at such hour as may be specified in the notice." This pastoral took no notice of the objections to synods which, in 1857, had been raised by the plaintiff's congregation, by the plaintiff himself, and by other congregations and clergymen within the colony. These objections were assumed, apparently, to have died out of themselves, and synods were dealt with as being of course legal and unobjectionable, both in regard to the constitution of the body and the matters to be considered by it.

On the 29th November, 1860, the plaintiff wrote the defendant a letter in which he objected to recognize the synod, as it had not authority either from the Crown or the colonial legislature, and referred to the objections he had stated, and the course he had taken in 1857, upon "opinions still unaltered." The letter continued "Holding such sentiments, your Lordship will perceive that were I to have called a meeting for the election of delegates in my parish I should virtually have to acknowledge the acts and constitutions of the synod, which I regard as an illegal body. I have, however, given copies of the document to my churchwardens and sidesmen, as the representatives of the laity in my parish, and if they desire to hold a meeting to elect a delegate, or are requested to do so by those whom they represent, I shall not interfere with their liberty, but I can take no part whatever in such meeting." On the 30th November, 1860, the defendant wrote the plaintiff that he had received his note "in which you decline to give notice of the approaching synod nearly a fortnight after the time when that notice was appointed to be given. *I do not mean to discuss with you the question of the lawfulness of holding diocesan synods; no one now whose opinion is worth having has any doubt upon this point,* nor do I mean here to take notice of the grave charge which you have thought fit to bring against your Bishop and your brethren, of their having declared their secession from the Church of England. This daring and wanton charge must lead to your being tried for it, as a grave ecclesiastical offence. My object in writing to you is, to call on you, by the oath which you made to me at your ordination, and again on your being licensed, to give the notice, which two months ago, I called upon you to give. I cannot allow you to leave your parishioners in ignorance of the fact which concerns them, and not you: that they are invited by their Bishop, to elect a delegate to represent their views in the

approaching synod. I have only to add that I cannot excuse your attendance at the synod." "Refusal now to attend a perfectly lawful assembly can henceforth be regarded as nothing short of an act of schism."

A correspondence then ensued between the parties, which resulted in the registrar of the diocese, on the 27th December, 1860, serving upon the plaintiff "a citation" to appear before the defendant in the vestry of the Cathedral on the 4th of February, 1861, "to answer for having neglected and refused to obey the commands and directions of your Bishop to give notice of a meeting to be held in terms of a certain letter addressed and forwarded to you, and dated the 1st October, 1860, with the pastoral issued on the same day, and therein enclosed, in reply to which you did, in a letter dated 29th November, 1860, addressed to the said Bishop, refuse to obey or otherwise carry into effect the directions thus conveyed to you." According to this citation, which is the foundation of the subsequent proceedings, the specific and only offence charged is the same as that alleged in the correspondence, namely, a neglect or refusal to give notice of a meeting in terms of the letter of the defendant of the 1st October, 1860.

The plaintiff on the 31st December, 1860, wrote the registrar that he must be understood as attending "without prejudice to such rights as, according to the constitution of the Church and his Lordship's authority in this colony, may belong to me as a presbyter of the Church of England." On the 4th of January the registrar answered that "the proceedings of the court" would "be public;" "the charge is fully set forth in the citation, and the letters therein referred to, with other evidence, if necessary, will be produced." The plaintiff appeared, in terms of the citation. The defendant was assisted by assessors whom he had chosen, consisting of five of the clergy of the diocese, and the plaintiff was assisted by counsel and solicitor. The plaintiff tendered personally a written document in the shape of a defence, in which he questioned the legality of synods called "without the consent of the Crown or of a competent legislature," and concluded: "Obedience to such a body, without such authority constituted after I accepted the incumbency of St. Peter's, cannot be reasonably required of me, when it has been superadded upon the previous arrangements of the diocese, in opposition to my well-known and honest opinions." The counsel of the plaintiff then handed in the following paper: "We hereby

protest that no judgment or sentence pronounced by the Right Reverend the Lord Bishop of Cape Town, as the judgment or sentence of any alleged court, is in any degree binding on the said Rev. William Long; because no lawful authority is vested in the said Lord Bishop of Cape Town to hold, by himself or others, any court or courts competent to hear and determine any causes of any kind whatever."

The documents which I have mentioned having been handed in, and the charge "having," as stated in the defendant's pleas, "by sufficient documentary proof, in the form of declarations taken before a justice of the peace, been fully and satisfactorily proved," and read and "produced in the presence and hearing of the plaintiff, and neither by him nor his legal advisers questioned, rebutted, or otherwise taken exception to," the defendant pronounced against the plaintiff sentence of suspension. This sentence sets out with saying: "On the 1st of last October you were instructed to give a certain notice in your church. You allowed the time for giving it to pass over, and on the 29th November wrote a letter to your bishop refusing to give the required notice." The sentence, after recapitulation of what had passed, continues: "You refused again, after admonition, to give any notice, though told that you might do so in such a form as might meet your scruples, provided it were a substantial notice of the matter of fact which you were required to announce." The sentence then speaks of the plaintiff's demeanour at this meeting, discusses whether his refusal arose from conscientious or contentious motives, and assigns to them the latter character. It continues: "But were the plea of conscience a valid one, were there nothing to shake confidence in its sincerity, it would not touch the real question, which is one, not of opinion or of conscience, but of fact, namely, whether you were called upon to do what the law forbade you to do. Into that question I do not feel it here needful to enter, because," the sentence continues, if the plaintiff's view of the law were correct the sentence would be reversed on appeal to the Archbishop of Canterbury. It then resumes—"But you have taken up other ground," and, after speaking of the protest as a document which cannot be "entered upon the records," continues, "regarding it as merely forming part of your defence, I must observe that it asserts for you the position of an independent minister, free from the restraints and laws of the Church of England, exempt from the jurisdiction of the bishop to whom that Church has committed the charge and

government over you. To put in such a document is virtually to reject episcopacy and the Church and to step on the very confines of schism, if not to have overstepped the line." The sentence then discusses the protest, as affected by the letters patent, and shows that the plaintiff likewise repudiated the Queen's supremacy. It then shows that the plaintiff has broken his ordination vows of obedience, and concludes thus: "Reviewing, then, this whole case, as now before me, considering how open and continued has been your resistance to lawful authority, how unprovoked has been this contest, how easily it might have been avoided, how fruitless have been the loving efforts made by others to convince you of the false position you have taken up; seeing that the question you have raised is no less than this, whether law and order or anarchy and confusion shall prevail in the Church; nay, whether there is anything such as law amongst us; assured that there can be no doubt that the laws and customs of the Church of England justify your Bishop in the course which he has pursued, the rubric after the Nicene Creed expressly recognizing his authority in this particular matter, and believing that you have no reasonable ground for thinking that you were called upon to do an illegal act, the evidence to the contrary, if you would have discussed the points with your Bishop, being conclusive,—I have no alternative left but to pass sentence upon you for your repeated acts of disobedience, and your defiance of the laws of your Church, and the authority of your Bishop."

After this introduction, the formal part of the sentence was that the plaintiff should be suspended from his ministerial functions for three months from the 8th February, 1861, and "thereafter until you shall have expressed regret for your past disobedience, and your willingness to render obedience for the future." This sentence was communicated to the churchwardens of St. Peter's by the registrar of the diocese. In answer to this communication, these gentlemen wrote the registrar on 8th February, 1861: "We have been advised that the said sentence was not delivered by lawful authority or in a lawful manner, and that it is not binding on Mr. Long, and that he may lawfully therefore proceed with his functions as incumbent and minister of St. Peter's, notwithstanding the said alleged suspension, and we learn from Mr. Long that it is his intention to do so." On the 19th of February, 1861, the registrar of the diocese served a citation on the plaintiff to appear before the defendant on the 6th

March, to answer for having failed to render obedience to his Bishop, and acting in defiance of the laws of your Church and the authority of your Bishop, " for that whereas after sentence of suspension *ex officio*, for all and several the acts and omissions therein set forth, had been read and delivered in your presence on the 8th February instant, you did not thereafter refrain, as by the said sentence you were directed and required to do, from the exercise of clerical functions, but, on the contrary, continued to discharge parochial duties, and to officiate and perform Divine service in the parish church of St. Peter's, Mowbray, thereby setting," &c., " which acts and doings were and are, or some or one of them were and are, or is, true, public and notorious."

The plaintiff did not appear to this citation, having previously written the defendant: " I neither can by appearing to-morrow recognize your Lordship's legal or moral right to be a judge in a matter between your Lordship and myself." The defendant, however, proceeded in the plaintiff's absence and pronounced sentence of deprivation against him, and at the same time withdrew the licence he had given him at the time of ordination. This sentence was communicated to the churchwardens, who were at the same time informed that another gentleman had been appointed to act in the plaintiff's stead, to whom, during the vacancy, half of the offertories and the 100*l.* a-year payable by Mr. Hoets, would have to be paid for such period as the gentleman in question might officiate.

I may here observe that the observations in the judgment of suspension as to the general conduct of the plaintiff were irrelevant, inasmuch as the plaintiff had not been cited before the defendant on a general charge of contumacy, but for one specific act of alleged disobedience, as I have before shown, namely,— " refusing to obey the commands of your Bishop to give a notice of meeting," &c., and therefore the sentence is open to this objection, that it is so framed as not to put it in the power of the court to see how far the punishment was awarded in respect of relevant matter. It may be said that, in judging of the specific act of disobedience charged, the defendant was entitled to take into consideration the general conduct of the plaintiff as aggravating the specific offence, but then the sentence is open to this observation, that it exaggerates and misrepresents the general conduct of the plaintiff. No one reading the protest of the plaintiff dispassionately can say that it " asserted for him

the position of an independent minister, free from the restraints of the laws of the Church of England, exempt from the jurisdiction of the Bishop to whom that Church has committed the charge and government over you," and to put it in was "virtually to reject episcopacy and the Church, and to step on the confines of schism, if not to have overstepped the line," and that it "repudiated the Queen's supremacy." This last was surely the very climax of exaggeration when the defendant had before him the plaintiff's letter of the 3rd December, 1860, in which he said "so long as the supremacy of the Crown is a great constitutional principle in the Church of which we are members, and so long as the acknowledgment of that supremacy is a moral obligation resting by their vows upon her bishops and presbyters, I again say I cannot attend the meeting." The protest, moreover, was an assertion made, not by the plaintiff before trial, so as to form subject of comment during the trial, but by his counsel in the course of and as part of the trial, and, therefore, it could not be imputed to the plaintiff as his personal act, or form the subject of comment against him, and whether made by the plaintiff or by his counsel, and whether imputable to him or to his advisers, was in its very terms no more than an assertion that, according to law, the plaintiff could not "hold a court to hear and determine any causes of any kind," a proposition the truth of which is now to be tested, and the raising of which cannot be imputed to the plaintiff as a crime or offence, any more than it could be imputed to the defendant, as a crime or offence, that he has denied the jurisdiction of this Court to try this case.

The sentence of deprivation and the appointment of a successor to the plaintiff during the vacancy in the living having been communicated to the churchwardens, and through them to the plaintiff, the plaintiff and the wardens applied to this Court for an interdict to restrain the defendant and his nominee from hindering the plaintiff in the performance of his duties as incumbent of St. Peter's, and in the enjoyment of the temporalities of the incumbency; and on hearing a motion to make the rule for that interdict absolute, an order was made restraining the plaintiff from performing his clerical functions and the defendant from interfering with his enjoyment of the temporalities until the rights of the parties should have been ascertained in an action in which the incumbent should be the plaintiff and the Bishop defendant; but to which it was intimated that neither

the churchwardens nor Mr. Hughes, the nominee of the defendant, need be made parties. These proceedings took place while I was absent on circuit. Pleadings were accordingly framed, and after they had been completed the cause was set down for argument, and the parties were heard, and the case now stands for judgment on the pleas raised by the parties respectively.

With this preliminary history of the connection between the parties, and of the dispute that has arisen between them, I shall now consider the questions raised upon the pleadings and by the arguments at the bar.

The broad question which is at issue between the parties is, whether the defendant, as Bishop of Cape Town, lawfully suspended the plaintiff, the incumbent of St. Peter's, Mowbray, from the exercise of his clerical functions in that church, and the sentence of suspension having been disregarded, whether the defendant lawfully deprived the plaintiff of the living. This question the plaintiff has brought into this Court for decision. The defendant has objected *in limine* that this court has not jurisdiction to entertain such a question, as it is an ecclesiastical matter, proper to his (the defendant's) jurisdiction as bishop. This preliminary question must be disposed of first. If we lay out of view for the present the letters patent constituting the defendant a bishop, and giving him, as he alleges, the jurisdiction which he claims, there could not be a doubt of the jurisdiction of this Court to try the question between the parties, as it would be the judicature to try any question which might arise between any Church of any denomination within the colony and any of its members; not to the effect of saying for the body what was proper doctrine or discipline for it to observe, but of saying what the body had itself declared to be its proper doctrine and discipline, according to the instruments which it had itself framed for its constitution, and of determining whether the matter in dispute between the body and its member had been conducted in conformity with the rules prescribed by these instruments. To every mind acquainted with the first principles of jurisprudence this must be so evident that no authority should be necessary to support the proposition, but there are several, and—not to mention the Cardross case in Scotland—none is more striking and conclusive than the case of Dr. Warren in England, so much relied on by the defendant in the course of his argument. In that case Lord Lyndhurst did not at once dismiss the case as ecclesiastical, and not coming

within the scope of his jurisdiction. He entertained the suit to the effect of inquiring whether there had been any, and what, laws adopted by the dissenting body, the Wesleyans, of which Dr. Warren was a minister, and whether the suspension of that gentleman had been conducted in conformity with those laws, to which he had assented and made himself subject by becoming a member of the body. Even in England, and in questions between the Church of England and its members, these are tried by courts composed of lay judges. That has been the case ever since the act of Hen. VIII., cap. , which declared that doctors of laws might be judges of the ecclesiastical courts, though not themselves ecclesiastics. The only difference is that in England the law has given a distinct jurisdiction for consideration, not of all ecclesiastical causes, but of those relating to the Church of England alone.

There can be no doubt, therefore, that this Court has jurisdiction to try the question at issue between the plaintiff and defendant, at least to the effect of inquiring into the relative position of the parties to each other, unless its jurisdiction has been taken away by the letters patent of the defendant, either expressly or by necessary implication. If this Court had jurisdiction by virtue of the Charter of Justice previous to the issue of the defendant's letters patent, as, in my opinion, it had, that jurisdiction has not only not been taken away by these letters, but has been expressly saved by that clause in them which declares that they are not intended to alter the jurisdiction already given to any court of judicature within the diocese.

The jurisdiction of this Court, then, has not been expressly taken away by the letters patent—the defendant has no privative jurisdiction under them;—and the only question that remains is, do the letters patent give the defendant cumulative or concurrent jurisdiction? The solution of that question will depend upon the validity and effect of the letters patent themselves, so far as they profess to give ecclesiastical jurisdiction—a question which is raised by the second and third pleas in reconvention, in which the defendant asks that it may be adjudged that the letters patent of 1847 and of 1853 are valid in law, and do confer the rights and powers claimed thereunder, and that ecclesiastical jurisdiction may thereby be lawfully exercised by him, and that the letters patent of 1847 were not revoked or in any way invalidated by those of 1853, or by the defendant's resignation under them.

The 1st of Eliz., cap. 1, in sec. 18, gave the Crown power to appoint by letters patent persons to execute, under the Crown, all manner of jurisdiction "touching or concerning any spiritual or ecclesiastical jurisdiction." At the time this Act was passed there were already in existence throughout England ecclesiastical courts for the trial of all spiritual and ecclesiastical causes. The Act was not intended to give the Crown power to interfere in any way with these recognized institutions of the country. Its object seems to have been to enable the Crown to originate a court which should stand in the place of the Papal courts of Rome, and be a state engine for completing and enforcing the Reformation, and with it separation from the courts of Rome. The power given by the statute was exercised in the erection of the Court of High Commission, which, as every reader of English history knows, became so intolerable by the tyranny and oppression with which its jurisdiction was exercised, that one of the concessions wrung from Charles I. was its entire abolition. This was accomplished by the Act 16 Car. I., chap. 2, which repealed the statute of 1 Elizabeth, but in such sweeping terms that with the Court of High Commission it destroyed all the ordinary long-existing and well-recognized ecclesiastical courts of the kingdom. This excess in legislation was remedied by the Act 13 Car. II., cap. 12, which repealed the Act 16 Car. I., so far as it had abolished the ordinary courts of ecclesiastical jurisdiction, and declared that these courts might continue to exercise their jurisdiction as they had possessed it previous to 1639, but it continued in force the Act of Car. I. so far as that Act had abolished the Court of High Commission, and prohibited for the future the erection of any similar court, and so far also as it had abolished the power given to the Crown by the Act of Elizabeth, to create ecclesiastical jurisdiction by letters patent.

As this Act of the 13 Car. II. stands unrepealed to this day, it was *ultra vires*, in my opinion, for the Crown to give to the defendant any ecclesiastical jurisdiction by the letters patent of 1847, for the Act of 1st Eliz., which gave the power to the Crown, gave it within these her realms of England and Ireland, "or any other her Highness's dominions and countries:" and, as the Acts of 16 Car. I. and 13 Car. II. took away the power generally, they destroyed it in regard to the "other dominions and countries" of the Crown, as well as in regard to England and Ireland. On this ground alone, if there were none other, I

apprehend that the defendant cannot have ecclesiastical jurisdiction by virtue of the letters patent of 1847.

But the defendant's claim to have such jurisdiction under the letters patent is open to further objection. It is very true, as argued by the defendant, that these letters of 1847 have never been revoked by the Crown; they subsist to the effect of supporting the defendant's nomination as a bishop by the Crown, and his consecration by the Archbishop, in obedience to the commands of the Crown contained in the instrument, and of supporting, moreover, everything that had been done by the defendant under the authority of the letters, previous to the day on which the defendant placed his resignation of his See in the hands of the Crown, for the purpose of enabling it to issue the letters patent of 1853. But from the moment that the defendant completed his resignation he ceased to be bishop under the letters of 1847, and that instrument became a mere *caput mortuum* as to everything which might occur thereafter; in fact, the whole features of the instrument were expressed, so to speak, by the superposition of the letters patent of 1853, which, in addition to other matter, assuming the defendant to be a bishop, as I have already said he continued to be under the letters of 1847, gave him all the powers of that instrument *in ipsissimis verbis*. The moment, therefore, that the letters patent of 1853 were issued, the defendant, though he continued to be a bishop, consecrated under authority of the letters patent of 1847, ceased to have any power under that instrument, and derived all his powers from the letters of 1853.

With regard to the letters patent of 1853, they are, like the letters of 1847, open to the objection that they were void under the Acts 16 Car. I. and 13 Car. II., so far as they professed to give the defendant ecclesiastical jurisdiction within the colony. These letters of 1853 are, moreover, open to another objection. So far as they gave the defendant ecclesiastical jurisdiction, so far they legislated for the colony, but, at the date of their being issued, the Crown had already, by the grant of a constitution to the colony, parted with the power of legislating for the colony by letters patent. This has been received law ever since the case of Campbell *v.* Hall, in the last century. The letters patent of 1853, therefore, are open to the objection of nullity on this ground also, so far as they profess to give the defendant ecclesiastical jurisdiction.

The result, in my opinion, is that the defendant had not, by

virtue of the letters patent, either of 1847 or of 1853, any ecclesiastical jurisdiction by virtue of which he could hold a court for the trial of any ecclesiastical cause within the colony; and, as a necessary consequence, he had not any jurisdiction by virtue of the clauses in these instruments professing to give ecclesiastical jurisdiction to try the matter at issue between him and the plaintiff.

The jurisdiction of this Court remains, as it existed previous to the issue of the letters patent, unaffected by these instruments, but the defendant insists that he has jurisdiction over the plaintiff "by the laws of the Church," or "by the laws of the religious association" to which he and the plaintiff belong, or alternatively that he has gained jurisdiction over the plaintiff on the ground of personal contract entered into between them. The solution of these questions will depend upon whether there is any religious association in the colony of which the plaintiff and defendant are members, and upon the nature of that association, and alternatively upon whether any contract has been formed between the parties and upon the terms of that contract. These two questions are separable, no doubt, and were separately argued in the address which the defendant read to the court; but if the first of them, in regard to religious association, be raised at all on the record, it is only to be found mixed up with the second question in regard to contract, in the fifth claim in reconvention, which prays it may be adjudged that, "supposing the letters patent did not exist, the plaintiff, by reason of the matters aforesaid, is subject and bound by the laws and canons of the Church of England, and to the doctrine, discipline, rules and orders of the said Church, and that the defendant, as such bishop of said Church, possessed the powers thereby awarded to and acknowledged to belong to and be exercised by a bishop of said Church." The religious association spoken of here, and there is none other mentioned in the pleadings, seems to be the Church of England, and it seems to be assumed that that Church exists in this colony.

In England and Ireland, the law assumes that Church to be "The Church," and has declared what are its doctrines, discipline, rules, and orders, and what are the powers of the officers in it, and how they are to be exercised, as in Scotland the law has assumed the Church of Scotland to be "The Church." When, therefore, in England, any one is consecrated a bishop, it follows, as of course, that he is a bishop of the Church of

England, the established and the only recognized Church of that realm, and he may by law exercise all the functions proper to his office, as ascertained by law. If any one ask ordination as a priest of a bishop so consecrated and obtain it, he is ordained a priest of the religious association called the Church of England; and these parties—bishop and priest—have their reciprocal duties towards each other, and have their individual rights and powers acknowledged, defined, and protected by law. But in this colony, the Church of England, though known historically and popularly, is unknown to its law. The law of the colony does not recognize the existence of such a Church any more than it does the existence of any other Church. The colony has no established Church now—it does not recognize any Church as existing by force of law—each Church claiming to be such, must, before its courts, prove its constitution, and the laws and rules it has adopted for its maintenance and continuance.

Huber, in his work "De Jure Civitatis in Rebus Sacro Sanctis," ii., tit. 1, No. 17, defines a Church to be "a multitude of believers in God who practise a fixed and public mode of worship in a certain place." Is there a Church within the colony having a fixed mode of worship which has made the defendant its bishop, and of which the plaintiff is a priest? The law in England has declared that in the churches appropriated by law for worship according to the form and ritual of the Book of Common Prayer, of which there is one in each parish, with endowments more or less valuable, no other form or ritual shall be used in these churches, on pain of the offender being deprived of his office, entitling him to use the church and of the temporalities attached by law to the office. But the law is silent in regard to what ritual shall be observed beyond the limits of England, in regard even to clergy who may have been ordained in England as priests of the national Church. The Church of England may, no doubt, be recognized out of England in any Church, which, either by a law of its own making or by a law imposed on it by the legislature of the country where it is situated, shall bind itself to observe the forms and ritual of the Church of England, and to obey the laws and canons by which that Church is governed. Such a Church might not inaptly call itself the Church of England for distinction's sake; but the Church of England properly so called, with all its rights and privileges, existing by law and the powers and duties of its

hierarchy and other officers defined by law, is purely a territorial Church, limited in its sanctions by law to the soil of England.

The plaintiff was ordained a deacon under the 59 George III. "for the cure of souls in her Majesty's foreign possessions," but there is nothing in that statute which compels him to observance of the Book of Common Prayer, or of any particular form of prayer or ritual in the foreign possessions. The preamble of the statute speaks of persons to be ordained "although not provided with the titles required by the canons of the Church of England, of such as are to be made ministers," and speaks of their ordination as "greatly tending to the advancement of religion;" and in all probability the statute contemplated services to be rendered to persons desirous of conforming to the ritual of the Church of England, still if the plaintiff could have found a Church, observing another ritual, desirous of his services, there is nothing in the enacting part of the statute which could have prevented him from rendering them.

So, as to the defendant, he claims to be a bishop of the Church of England, and it would seem to me that he is so. While in England he is a bishop without a See, if we dissociate the assignment of a See from his nomination and consecration, in the same respect that the bishop of a See in England continues to be a bishop after he has resigned his bishopric. The only difference, I apprehend, being in the one case that the office is divested of jurisdiction though it retain the power of orders, while in the other it has obtained the power of orders, but has not yet been clothed with the power of jurisdiction. Godolphin, cap. 3, section 9, says: A bishop has three powers: 1st, Ordinis; 2nd, Jurisdictionis; and 3rd, Administrationis rei familiaris. "The power of orders he hath by consecration, whereby he may take resignations of a church, confer orders, consecrate churches, ordain deacons and priests, dedicate churches, administer confirmation. The jurisdiction of the bishop is derived from the Crown by usage and prescription, and is coercive to punish crimes, &c.," and is not incident *de mero jure* to the office of Bishop. The power "of orders," he says, "doth not appertain as bishop of this or that place, but is universal over the whole world. Jurisdiction is not universal, but is limited and confined to his See." No doubt, Huber in "De Jure Civitatis," II. 3, 7, No. 6, says that bishops have the "power of binding and loosing, of conse-

crating altars, of giving holy unction, of visiting the clergy, suspending, deposing, and even excommunicating them, and dispensing with and imposing solemn penance." But that passage, as its terms show, and as the title to the section expressly states, applies entirely to bishops of the Roman Catholic Church.

The defendant's consecration under the letters patent gives him then, according to Godolphin, the power of orders all the world over to every one that may ask him to exercise it; but the framers of the letters patent, intending to clothe his office with jurisdiction also, have, by the letters, assigned him a diocese in this colony; but these letters are inept, as I have shown, for the conferring of jurisdiction, and they do not, any more than the statute 59 Geo. III., oblige the defendant to the use of the Book of Common Prayer or of any form of ritual in particular within the colony. It seems to have been assumed by the framers of the Act 59 George III., that those ordained under it would, in the foreign possessions for which their services were intended, be priests or deacons, as the case might be, of the Church of England, and by the framers of the letters patent, that not only the defendant, but all the clergy whom he might find within his diocese, would be of the Church of England—in short, that there was a Church of England already in the colony requiring only the apex of a Bishop to make the structure complete. But this is not so. Even in countries settled by emigration of subjects from the mother-country, who carry with them the laws of that country into the country of their adoption, so far as compatible with their changed position, it seems to me more than doubtful whether they carry with them the Church of England, its laws and canons, even although they may take in their company the whole order of the priesthood of that church. But in a ceded colony such as this, where the laws of the country, as they existed previous to the cession, continue in force, unless in so far as altered by the Crown or by the Imperial Parliament, I apprehend there can be no doubt that English subjects coming into it do not bring with them the English Church or its laws and canons; and by necessary consequence, I can see no ground for saying that English bishops and priests coming into the colony do, by force of their consecration and ordination in England, stand in the colony in these relative positions the one to the other, or that the one owes to the other any obedience beyond what the voluntary action of

his conscience may dictate. It cannot, therefore, be said in the colony that by reason of the one being a bishop and the other being a priest or deacon, without more, the plaintiff and defendant are in the colony members of the Church of England, or a bishop and priest of that Church.

If either of them were to adopt the creed or ritual of another church, he would defraud the object of his consecration or ordination; but that would be a question with his conscience alone, which the law of this colony, for anything that has yet been done, could not take cognizance of. If not in this colony a bishop or priest of the Church of England, there is no evidence of the existence of any religious association within the colony of which they could, as bishop and priest, be members. There are a number of congregations within the colony, worshipping after the form and ritual of the Church of England, but no one of these congregations, nor any number of these congregations, have bound themselves by any instrument to conform to that ritual, or to obey the laws and canons of the Church of England, except in so far as that can be said of the members of the synod formed under the direction of the defendant; not only is the legality of that synod one of the questions at issue between the parties; but the refusal of the plaintiff to become one of its members is one of the grounds of the defendant's complaint against him. It can never be in respect of membership of this association, therefore, that the defendant can have jurisdiction over the plaintiff, and no other association has been suggested except that of the Church of England, which, as I have observed, does not exist within the colony.

But the defendant contends that he has jurisdiction to try this question between him and the plaintiff on the ground of personal contract between them. This contract the defendant, in his first address to the Court, said rested;—1st. Upon the oaths taken by the plaintiff, when he was ordained a deacon in England, under the act 59 Geo. III.; 2nd. Upon the oaths taken by him, when ordained a priest by the defendant; 3rd. Upon the questions put by the defendant to the plaintiff, and answered by him at his ordination. With regard to what took place in England at the plaintiff's ordination as a deacon, that must be laid entirely out of the question, in considering the question of contract, as the defendant was in no way a party to that proceeding, and as to the oaths taken by the plaintiff at his

ordination, these are the oaths of allegiance to the Queen,—the oath of abjuration of the Pope's authority,—the oath as to simoniacal contracts,—and the oath of canonical obedience,—these all, with the exception of the last, may equally be laid out of view, for no one of them bears any reference to the defendant or to his authority, or to the Church of England. What, remains, then, will be the questions and answers at ordination, and the oath of canonical obedience. In his second address to the Court, the defendant rested the alleged contract between him and the plaintiff upon the grounds he had previously relied on, and also upon the contract between Hoets and the defendant, and the terms of the consecration of the church of St. Peter's, on a petition to the defendant to which the plaintiff was a party, and, as I understand, generally, upon the *res gestæ* between the defendant and the plaintiff, since the defendant's arrival in the colony.

The contract, which the defendant alleges, is one which is not only to establish against the plaintiff the obedience due by him as a presbyter to the defendant as a Bishop, but is to set up in favour of the defendant a jurisdiction in him to enforce obedience, without, as he argues, a power in any temporal court to review his proceedings in exercise of that jurisdiction: I find it difficult to understand how jurisdiction of this sort can be gained by contract. But before inquiring whether forensic jurisdiction, either ecclesiastical or temporal, can be gained by contract between private persons, I may remark that although in questions between authorities existing by law it may, *ex necessitate rei*, be the same person who is to exact obedience and to enforce its performance, it is opposed to the first principles of law as well as to justice and right reason, that where authority is to be gained, by contract, one and the same person should be a contracting party and at the same time the judge of the performance of the contract as against the other contracting party. However clearly such a provision might be expressed, no court would for a moment give effect to it, in a contract between laics, and I cannot see how it can make any difference that one of the parties is an ecclesiastic, or that both are ecclesiastics. It is no answer to this difficulty to say that when a bishop in England ordains a clergyman, after having taken from him the answers which the plaintiff at his ordination made to the questions put to him by the defendant, and likewise the same oath of canonical obedience which the plaintiff made to the defendant, it is the

same Bishop who is to be judge of the extent to which that obedience has been rendered; for, in the first place, there is nothing savouring in the least of contract in the ordination of a priest by a bishop in England—there is nothing of consideration or value passing from the priest to the bishop in the words of the oath of canonical obedience—the whole ceremony of ordination, particularly the questions put and answers given, show that it is one of conscience and duty. The first question is—"Do you think in heart that you be truly called according to the will of our Lord Jesus Christ," &c., "to the order and ministry of priesthood." Neither is there anything of consideration or value coming from the bishop to the priest in the words of mission: "Take thou authority to preach the word of God and to minister the holy sacraments in the congregation where thou shall be lawfully appointed thereunto." The qualification of the priest for holding a living with temporalities attached, conferred by these words, may be followed by the gift of such a living, but whether that shall happen, or whether the bishop who ordained, or some other person, shall be donor of the living, is a mere accident, no way dependent on or necessarily resulting from the ordination.

The bishop in ordaining has merely discharged a function of his office according to his conscientious convictions—a function which the courts of common law will enjoin him to perform, unless he can assign a sufficient reason for omitting to do so—and, so far as he has any part as judge in deciding whether due obedience has been rendered by the priest, should the priest obtain a living in his diocese, he has not that office by force of any contract between him and the priest, but by force of the law which gives him the office. If the living be in another diocese he is no judge of the priest in any respect. But, in the second place, it is only by fiction of law that the bishop is said to be judge; substantially, the judge of the bishop, who is more often a laic than an ecclesiastic, and is bound, like other judges, to regulate his decisions by law and precedent, is the person to decide, and if the proceeding should result in sentence of deprivation, though that sentence must be pronounced by the bishop in person, it is done by him as the mere organ of the judge—he cannot pronounce it unless authorized by the sentence of the judge.

In my opinion, therefore, the contract suggested by the de-

fendant would be void, so far as it should, even in express terms, make the defendant, one of the contracting parties, judge of its performance. But I do not find in any of the documents relied on, as together building up a contract, express words giving the defendant a forensic ecclesiastical jurisdiction over the plaintiff.

Without going through the questions put by the defendant to the plaintiff at ordination, to which he must have given affirmative answers, so as to point out what they apparently referred to, I shall assume for the present that the last question—"Will you reverently obey your ordinary," coupled with the oath of the plaintiff "to pay" the defendant "true and canonical obedience in all things lawful and honest," did infer an obligation *ad præstandum* — did infer a duty upon the plaintiff to do the particular act, for instance, out of which this dispute has arisen. I shall assume, indeed, that a promise to do that very act was in words contained in the oath. Still I do not see how such an oath, as that even, would constitute the defendant judge to say in what respect the obedience had not, in certain given circumstances, been rendered. A servant may promise and even swear that he will do a certain act; but the oath will no more make the master judge of the performance than if there had neither been promise nor oath, and the act required had fallen within the ordinary understood duties of the servant.

I do not see how it can make any difference, in the case supposed, that the party to whom the obedience is to be rendered is a bishop, known to the party promising the obedience to be, in England, judge, in the sense in which I have mentioned, of how far the obedience has been rendered; the law of this colony not making a bishop judge even in that sense or in any sense. Still less can I see how the party, who promises the obedience to a bishop whom he knows has not by the law of the colony any jurisdiction in such a case, is, because he knew when contracting that a bishop in England has jurisdiction to try such a matter, not personally, but by courts acting by fixed law and precedent, to be presumed to have contracted to give the colonial bishop jurisdiction even larger than the bishop in England enjoys, namely—to be, while a contracting party, not only plaintiff, but judge personally of the performance of the contract, without either law or precedent to govern his proceedings, except such as he chooses to adopt for himself, and which, the

defendant has informed us, includes the ancient canons of the Church Christian, without regard to whether they are or are not part of the received canon law of England.

Such an implication from the *status* of the defendant, known to the plaintiff at the time of contracting, seems to me to be repugnant both to law and to justice, more especially when we know, from the history of the letters patent, that the very clauses which would expressly give the defendant the powers which he is now professing to exercise were actually cut out of the draft of the letters patent by the advisers of the Crown, after deliberate consideration of the matter, and before they were issued. If the power of forensic jurisdiction were inseparable from the office of bishop, there might perhaps arise a question as to the necessity for drawing such an implication, and it might be said the plaintiff had himself to blame for having placed himself in such an unpleasant predicament—one in which he could not have the assurances, which the law holds out to every litigant, that the law applicable to his contract will be impartially administered. But no such necessity exists. *Jurisdictio* is as separable from the office of bishop as is *administratio rei familiaris*, which latter the defendant has not pretended that his office confers upon him within the colony. The power of orders does, as Godolphin says, arise from consecration, and appertains to the office all the world over. The implication to be drawn from the plaintiff's acknowledgment of the defendant's *status* as bishop will be, therefore, satisfied by imputing the acknowledgment of it to his power of orders. To extend it to the power of jurisdiction, which the defendant had not already in him by law, would, in my apprehension, be both violent in fact and unjust in its effects. Before the Court can affirm a contract having consequences such as are contended for, it should have strong and conclusive evidence that these consequences were within the intention of the parties at the time of its formation, and are clearly ascertainable from the documents alleged to set up the contract; but I cannot find any such evidence.

It is impossible for the plaintiff to deny—indeed, I do not understand him ever to have denied—that, in the proceedings on which the alleged contract is rested, he acknowledged the defendant to have the *status* of a bishop, and gained to himself the *status* of a presbyter under him; neither do I understand him to deny that the defendant had over him such jurisdiction as a bishop might exercise within the colony to that extent, perhaps

it may be said that there was a contract between them. In that view, if the question had arisen in England, the *status* once established, the jurisdiction would, as a matter of course, be the jurisdiction which the law of England has allowed to a bishop over his presbyter. But when the question arises out of England the nature of the jurisdiction has to be ascertained. When the letters patent were given to the defendant it was apparently intended that he should have such powers as a bishop in England has; and, moreover, that he should exercise these powers as a bishop in England may exercise them. This intention has failed to a certain extent, because the law will not allow forensic ecclesiastical jurisdiction to be given by letters patent. All that the defendant had, therefore, in him, when he arrived in the colony, and now has in him, as to every person who has not, like the plaintiff, as the defendant alleges, made an implied contract with him—if he have, in fact, made such a contract—is only the power of orders, which, as Godolphin says, is effectual over all the world; but without the power of jurisdiction, which, as that author says, is confined to the See, and which, within the See even, cannot be effectual till the law of the country where the See is shall have sanctioned it.

If, then, the plaintiff and the defendant are, according to the ordinary maxim, to be held to have known the law as to letters patent, all that could be inferred from the implied contract between them would be what the law allowed and the framers of the letters patent contemplated, presuming them also to have known the law, when they inserted in these letters the powers for the defendant to create officers for the trial of ecclesiastical causes within the colony, to wit, the power of orders, and a capacity to hold such jurisdiction as the defendant might be able to gain to himself, by express law made within the colony, or by express contract between the defendant and the laity and clergy of any church which, through the influence of his *status*, the defendant might be able to set up within the colony. If this be the legitimate inference to be drawn from the implied contract between the parties, then the defendant has never yet obtained for himself jurisdiction in either of the modes suggested—no law has been passed within the colony giving him jurisdiction, and no Church has been established by him within the colony defining, as in the case of other religious bodies, the nature of its constitution, and the powers and relative position of its clergy; such as the courts had before them in the Cardross

case in Scotland, and in Dr. Warren's case in England, and in the case of Danvers *versus* Rivaz, before the Master of the Rolls, and as exists in the case of Wesleyans and other religious bodies whose rules are not like the statute law of England in regard to the Church of England limited to the territory of England. The time, therefore, has not yet arrived when the defendant could exercise the jurisdiction which, by implication from the implied contract between him and the plaintiff, it may be presumed the plaintiff intended that the defendant should have over him.

The defendant has, moreover, argued that he has jurisdiction over the plaintiff, even though the letters patent did not exist, and that he has that jurisdiction as a bishop of the Universal Church, and that if he had not such a jurisdiction his *status* as bishop would be altogether nugatory and inept. The expression "Universal Church" is not without its meaning certainly, and *in foro conscientiæ*, such a Church, no doubt, exists; but it is an expression unknown to this Court. The plaintiff cannot, in my opinion, from any of the *res gestæ* which took place between him and the defendant be taken to have contracted with the defendant as a bishop of the "Universal Church." The plaintiff has not claimed to be a priest of the "Universal Church," and there is nothing to show that he was ordained a priest of the "Universal Church," nor, if the facts were otherwise, could this Court be able to discover, as a matter of legal inquiry, what are the powers and functions of a bishop of such a Church. The defendant can only be known in this Court as a bishop consecrated under the royal command, in exercise of the royal prerogative, who could have such jurisdiction only as the law of that part of her Majesty's dominions in which his See was assigned to him by the Crown might permit him to have.

Even if it were to be supposed that neither the plaintiff nor the defendant knew the law to be as it is in regard to the letters patent, but that they both imagined that the Crown had power to confer ecclesiastical jurisdiction by letters patent, and that the dealings between them, out of which the implied contract takes its rise, were conducted upon that understanding, all that could be inferred against the plaintiff would be that he supposed the defendant to have not only the power of orders, but of jurisdiction, and that he intended the defendant to have such jurisdiction over him as, in England, a bishop of the Church of England could have over his presbyter; but a jurisdiction to be

exercised in the mode, and in that mode only, in which a bishop could exercise his jurisdiction in England.

In England, until the passing of the Church Discipline Act, 3 & 4 Vict. c. 86, a bishop's jurisdiction over his clergy was exercised through courts constituted and judges appointed by him, who, under the control of the courts of common law, by prohibition, were bound to proceed according to the laws and canons of the Church, as the same had been sanctioned by the general laws of the country. Accordingly, the letters patent, contemplating the possession and exercise of jurisdiction by the defendant in this way, give him authority to appoint a "vicar-general, official principal, chancellor, rural deans and commissaries, either general or special with registrars and actuaries," such being the names of the different functionaries by whom in England the jurisdiction of the bishop is exercised. The exercise of the bishop's jurisdiction over his clergy for the correction of the matters referred to in the 3 & 4 Vict. c. 86, having encountered obstruction by the forms and delays of the ecclesiastical court, that statute was passed in order to give more prompt action to the jurisdiction for the avoiding of scandal to the Church. It therefore allows the bishop to appoint commissioners to inquire whether there is any ground for proceeding against the priest complained of. If they report that there is, and the priest agrees to their report, then, with his consent, the bishop may proceed at once to pass such sentence as the law allows. If the priest will not consent, then articles are to be prepared, and he is to be cited to appear by himself or his agent. If the priest assent to the articles, then also the bishop may proceed to sentence. If the priest do not assent to them, then the bishop must hear the case with the assistance of three assessors —one of them being an advocate of the Archbishop's court of five years' standing, or of the common law courts of seven years' standing—and an appeal from such sentence as the bishop may pronounce is allowed, first, to the Archbishop's court, and second, to the Queen in her Privy Council, two members of which must be bishops or archbishops. But the twenty-fourth section declares that "when any act is to be done or any authority is to be exercised by a bishop under this Act, such act shall be done or authority exercised by the archbishop of the province, in all cases where the bishop, who would otherwise do the act or exercise the authority, is the patron of any preferment held by the party accused."

If, therefore, the parties made the contract, with reference to the power which this statute gives a bishop over his prebyters, the defendant has not exercised the jurisdiction given him on such a view in the mode directed by this statute. He did not appoint commissioners to inquire—he took that upon himself. He did not appoint three assessors (one of whom was an advocate of standing), but five assessors, all of whom were clergymen, and all of whom (except one) held from the defendant licences for the discharge of their functions, in their terms revocable at the will of the defendant. Moreover, though the defendant is not as yet patron in possession of the plaintiff's church, he is patron in reversion after the lapse of the plaintiff's incumbency and of the incumbency of his successor; and as the result of the proceeding might be, as it has proved to be, the deprivation of the plaintiff and the consequent cutting off of his incumbency, the defendant had such personal interest, if not the same personal interest, as the twenty-fourth section of the statute makes it incumbent on the bishop not to try the case, but to send it to the Archbishop for trial in the first instance. In England, any bishop venturing to proceed under the act while having the patronage, would be prohibited from so doing by the courts of common law; and I much incline to think that these courts would issue a prohibition if the bishop had the same interest as the defendant has here.

But waiving the question of disqualification from interest, the plaintiff was entitled to assume, and may be presumed to have assumed, that, before the defendant would put in course of action the jurisdiction which the contract between them is supposed to have been conferring upon him, he would appoint the proper functionaries for the exercise of it, either according to the mode in use by law previous to the Church Discipline Act or under the provisions of that statute. The advantage of this to the plaintiff in a case which arises out of a personal conflict between himself and the defendant, and in which the defendant has a personal interest in the result, is too obvious to require comment.

It seems to me, therefore, with regard to the defendant's claim of jurisdiction on the ground of contract between him and the plaintiff, that if that contract is to be looked at, as framed with a knowledge of the law, in regard to the incompetency of the letters patent to confer ecclesiastical jurisdiction, the defendant has not yet obtained that jurisdiction in the only way in which, in that view, it could be obtained, either by an act of the

Imperial or of the Colonial Parliament, or by express agreement, defining its nature and extent, and the mode of its operation; that if the contract is to be viewed as having been framed in ignorance of the law as to the incompetency of letters patent to confer ecclesiastical jurisdiction, then the defendant has not yet set up the machinery which the letters patent contemplated, and which, on that account, the plaintiff was entitled to contemplate he would set up, for the exercise of that jurisdiction in an impartial and satisfactory mode; and that if the contract is to be construed as having been made with reference to the Church Discipline Act, which dispenses with ecclesiastical courts, and allows the bishop, in the special cases mentioned in the act, to exercise his jurisdiction in person, and as if that act, which is not of force within the colony, were adopted into the contract, the defendant did not proceed in the form pointed out in that act; and, moreover, it seems to me doubtful whether he could lawfully have done so on the other ground, being, under the twenty-fourth section of the statute, bound to have sent the matter to the Archbishop of Canterbury for trial in the first instance.

But, assuming that there is such a contract as the defendant alleges, having the effect expressly, or by implication, to constitute him judge of its performance, I find it difficult, as I observed before, to understand how forensic jurisdiction can be gained by contract between two private persons, and, adverting to the fact that the defendant has within the colony only the *status* of a bishop, without his forensic jurisdiction, he is, *quoad hoc*, only a private person. "Grotius, De Imperio," chap. 1, sect. 2, says: "The supreme power extends not only to things profane, but to things sacred;" and, as an instance in confirmation of this, or rather in confutation of the argument as to sacred things not being subject to temporal power, he says in chap. 4, sec. 1: "The power of parents over children, of husbands over wives were not first instituted by any human law, but received their origin and right from God himself, and yet that they are subject to the authority of the State, although they had existence prior to it, who will deny?" Voet, II. 1, 3, says: "Jurisdiction is most commonly divided into voluntary and contentious. Voluntary is that which is exercised between volunteers, as in adoption, manumission, emancipation;" and in sect. 30: "Authority (*imperium*) is not wanting to acts of voluntary jurisdiction, for adoption is made by command of the magistrate,

says the emperor, not that the magistrate forces any one to adoption, but inasmuch as the *Prætor* protects by his authority that adoption which at first was accomplished by the free will of the adopter and adopted, that no one may deny those things which were done under its authority." And Erskine, I. 2, 4, says: "Voluntary jurisdiction was exercised in matters which admitted of no opposition. The essential difference was that voluntary jurisdiction might be exercised by any judge in any place, whereas contentious must have been performed *pro tribunali*, and by that judge who was alone competent."

The voluntary jurisdiction spoken of in these passages does not mean jurisdiction voluntarily given to a third party, in regard to matters in dispute or contest between the parties giving the jurisdiction, but to matters where there is no contest at all, as is shown in the instance given of adoption, where the person adopted puts himself by the adoption under the jurisdiction of the *pater familias* of the family into which he is adopted; and, moreover, it refers to cases in which the jurisdiction is given to persons who have by law power to hold the jurisdiction, as in the same instance of adoption; for the *pater familias*, by the law of Rome, was absolute judge in his family, whose sentences the Prætor would enforce; and that it did not refer to cases in which jurisdiction is given, in matters of dispute or litis-contestation, to parties who hold no office or right of jurisdiction is shown by Voet, II. 1, 4, where he says, that "one jurisdiction is competent only by the gift of the prince, another by the concurring deed of the private parties or by prorogation, for, although by the agreement of private persons it is not competent to give it to those who have no office and hold no jurisdiction, yet by mutual consent it may be given to him who has not *such* jurisdiction,"—that is, the jurisdiction applicable to the case. This is confirmed by Erskine, I. 2, 27, where he says: "Prorogated jurisdiction or *in consentientes* is where by consent of parties jurisdiction is given to a judge who otherwise would not be competent to entertain the matter," and by Erskine, I. 2, 29, where he says "no private consent can *create* jurisdiction." To the same effect is the unanimous opinion of all the judges in Scott *versus* Avery, 11 Jur., N.S. 815. That was a case in which an insurer covenanted with an insurance company, that in case of any loss he would either accept the amount ascertained by a committee of the company, or if he disputed their award he would refer the matter in dispute to arbiters to be appointed, and that he would

not bring action until the award should have been given by the arbiters, the obtaining of which award should be a condition precedent to the bringing of action. A majority of the court held that, as it was part of the agreement that action should not be brought until the award had been obtained, the insured was not entitled to bring action until the award had been obtained; but while this was the decision of the majority, the majority agreed with the minority in opinion, that a prospective agreement not to have recourse to the courts of the country was illegal. The supposed contract between the present plaintiff and defendant is of that nature. Even if there were, therefore, in this case, as I am of opinion there is not, an express contract giving the defendant jurisdiction to try the matter in dispute between him and the plaintiff, such a contract, being illegal, would not, in my opinion, support the exercise of jurisdiction.

It was argued by the defendant that any possibility of injustice being done the plaintiff by his sentence was provided for by the appeal given by the letters patent to the Archbishop of Canterbury. If the plaintiff had lawfully contracted to give the defendant jurisdiction over him subject to such right of appeal, of course, he would be bound to accept such right, for what it might be worth. But I may observe that that would in all probability prove to be but little. The Archbishop of Canterbury's jurisdiction is in law confined to his province of Canterbury, and there is no reason to presume that he would accept the jurisdiction in appeal given him by the letters patent. Within England if he refuse to hear appeals, in cases in which appellate jurisdiction is given him by law, the courts of law will by *mandamus* enjoin him to hear them, as was done in the case of Poole *versus* Bishop of London, in regard to the manner in which the Archbishop had discharged his appellate jurisdiction. But if the Archbishop were to refuse to hear an appeal by the plaintiff against the defendant's sentence, I know of no authority by which he could be compelled, as I apprehend the letters patent, by giving the right of appeal to his Grace, do not impose any legal obligation upon him either to accept the appeal or to dispose of it.

I have not made any account of the argument of the defendant that, without forensic jurisdiction, his power as Bishop would be inept, and anarchy and confusion would prevail—the necessity or expediency of a power may be a good argument for giving the power, and might weigh with this Court if it were

the authority to give the power, but our duty is confined to ascertaining whether the power *has* been given. Even if forensic jurisdiction were given by this contract—the Court is agreed that it is not given by the letters patent—that would not prevent anarchy and confusion, as to such of the clergy already in the colony as had not contracted with the defendant, or such clergy as might hereafter come into the colony and refuse to contract with him. But I do not see any proof of a necessity for the power. Dean Milman, in his "History of Christianity," vol. ii., p. 71, says, that originally "the authority of the Bishop was that of influence rather than of power." The worship of God in this colony, according to the ritual of the Church of England, had existed many years before the defendant's arrival, without the exhibition either of anarchy or of confusion, and its character has not changed since his arrival, nor does what has passed with the plaintiff form any exception to this remark. The defendant's authority, therefore, may be presumed, up to the time of this dispute, and at the time of the making of the supposed contract, to have been that of "influence rather than of power."

The defendant now claims to have a power beyond that of influence. The same venerable and venerated writer says, "Rights are never clearly defined till they are contested, nor is authority limited as long as it rests upon general reverence." If the defendant thinks that his power should be defined, and not longer be allowed to rest upon general reverence, let it be defined by law or by positive express agreement between him, his clergy, and his laity, as has been done by other religious bodies – the Dutch Reformed Church, the Wesleyans, and the like—but I cannot see any ground for saying that that has been already done, as between the defendant and the plaintiff.

The sentence of suspension, therefore, in my opinion, was pronounced in a proceeding *coram non judice*, and the same observation will apply to the sentence of deprivation pronounced to enforce the sentence of suspension. This would be sufficient to dispose of the case in the view I take of it, if it had rested upon the original application for interdict, and make it unnecessary for me to go into the merits of the dispute between the parties; but as these merits are submitted to the Court by the plaintiff's declaration, and also by the defendant's pleas in reconvention, the parties are entitled to have my judgment upon the merits, in case the matter should not end with the decision of this Court.

The plaintiff in the first prayer of his declaration prays it may be declared that it was contrary to law and to his just rights in the defendant to require him to take any part in the proceedings of either of the two synods, or to consider himself bound by any of their decisions; and the defendant in his first plea in reconvention prays it may be adjudged that the plaintiff was bound in accordance with his directions to have given the notice required to be given by him, and that the giving of such notice or the holding of the synod was not contrary to law, and that the refusal to give such notice or render obedience to such directions was a breach of discipline. What I have already said applies only to the claim of the defendant to forensic jurisdiction over the plaintiff in the matter in dispute between them. It remains now to consider the other branch of the contract, that which is alleged to have made it the duty of the plaintiff to give the notice required, and to say how far the refusal of the plaintiff to give the notice was a breach of the contract, so as to entitle the defendant to the last prayer of his pleas in reconvention, that the plaintiff should be restrained by interdict, so long as the sentence of deprivation should continue in force from occupying or attempting to occupy the church of St. Peter's, or interfering with the duties thereof, or whether the plaintiff is not rather entitled to the last prayer in his declaration, that he is entitled of right to exercise all the lawful functions of minister and incumbent of St. Peter's Church.

It is necessary for me, therefore, to consider what was the nature and extent of the contract between the parties, irrespective of the question of forensic jurisdiction. It seems to me that the contract is to be construed with reference to what took place at the consecration of the defendant and at the ordination of the plaintiff. On both of these occasions the parties were the one consecrated and the other ordained as a bishop and a priest, who were to use the Book of Common Prayer of the Church of England, and who were to be regulated by the laws and canons of that Church. When, therefore, the plaintiff was ordained by the defendant, he recognized in the defendant the *status* of a bishop of the Church of England, and dealt with him as a person who would stand in that relation to him in his own character as a priest of that Church. What, therefore, a bishop of the Church of England could in England call upon his presbyter to do, that the plaintiff must be considered to have agreed that the defendant might in this colony call upon him

to do. What the defendant did call upon the plaintiff to do was to give notice of a meeting of his parishioners for the election of delegates from them to a synod, to be composed of the clergy of the diocese, and of lay delegates from the different congregations throughout the diocese, and to be held for the purpose of passing, as that body had in a previous session passed, "constitutions and acts," a copy of which "constitutions and acts" were sent along with the letter speaking of the proposed meeting and referred to in it.

If a bishop in England could have called upon his presbyter to give the notice required, and could enforce the order on refusal by sentence of suspension and deprivation, then it seems to me that the defendant might also call upon the plaintiff to give the notice, and although he could not enforce his order by a decree of suspension and deprivation, because, in my opinion, he has no forensic jurisdiction as a bishop in England has, yet it would be competent for the defendant to come to this Court to complain that the plaintiff had broken the agreement between them, which included obedience to the defendant in the particular matter, and to ask the Court to interdict the plaintiff from performing his functions in the church of St. Peter's, and from drawing the appropriate stipend, until he should comply with the order.

Whether the order was a lawful one, or one which the plaintiff was bound to obey, will depend, in the first instance, upon the proper construction to be put upon the rubric after the Nicene Creed. That rubric directs that the "curate" shall give certain specified notices, and continues, "and nothing shall be proclaimed or published in the church during the time of divine service but by the minister; nor by him anything but what is prescribed in the rules of this book, or enjoined by the Queen, or by the ordinary of the place." It was argued for the defendant that this rubric was a negative pregnant with a command, not only that the minister should not proclaim anything but what is prescribed in the Prayer-book, or enjoined by the Queen or by the ordinary, but that he should proclaim whatever notice should be enjoined by the ordinary. I confess I cannot so read the rubric. We know historically that, in the times in which it was framed, the clergy were both ignorant and illiterate, and that the rubric was framed to restrain the giving of "frivolous, unbefitting, and ridiculous" notices, as Wheatley expresses it. All that seems to me, therefore, to have been intended by the rubric was to give

the ordinary power to prevent the recurrence of these evils, by saying what should or should not be published, but not to give him a power over the minister to force him to publish notices not sanctioned by the laws of the Church or inconsistent with its form of government; and I believe the practice is in accordance with this, and that notices are constantly being given in churches in England which neither are enjoined by the Book of Prayer, by the Queen, or by the ordinary.

Whether the order given by the defendant was a lawful one will also depend upon whether the object of it was a lawful one, in respect of the composition of the proposed synod, and of the purposes for which it was to be held. Although in the Saxon times the bishop and the sheriff sat together in one court, the one to administer the ecclesiastical and the other to administer the temporal law, and although the churchwardens, being laics, were wont to attend the annual visitations of the bishop, sometimes called Synod, as *testes synodales* in regard to the morals of the inhabitants of the diocese, yet with these exceptions, if they be exceptions, I am not aware of any instance in the history of the Church of England, from ancient times, and, at all events, from the time of the Reformation, in which the people have sat along with the clergy as members of the diocesan synod properly so called.

The defendant, in support of his position that he was entitled to call a synod of the laity as well as of the clergy, referred to a passage in the "Reformatio Legum," in which it is said, "Episcopus ad locum aliquem interiorum cum toto clero migrabit exclusis omnibus laicis, his exceptis quos ipse manere jusserit;" which being translated, is, "The bishop will remove to some inner chamber with all the clergy, all the laity being excluded, except those whom he shall have ordered to remain." This is the only authority on which the defendant relied to show that the laity might be called to sit with the clergy in synods diocesan, which Burn, II. 30 b, describes to be the "assembly of the bishop and his presbytery to enforce and put in execution canons made by general councils or national or provincial synods, and agree upon rules of discipline for themselves." There is no mention of laity here in the constitution of the body, and there is as little in the objects of it. The rules of discipline are not for the laity, or for the laity and clergy, but for the bishop and his presbyters "themselves," without one word as to the laity. As the clergy were to be bound by what was done

in these synods, so far as appears, they had a right to be summoned and to attend, and take such part in their proceedings as they might, and the bishop could not, at his discretion, have admitted one and have excluded another. Accordingly, the "Reformatio Legum" says, "cum toto clero," with the whole clergy; whereas the laity, being no way to be bound by what passed, had no right either to be summoned or to attend and take part in the proceedings; but, being there as auditors allowed by courtesy, the same authority says they were all to be shut out except those whom the bishop should choose to favour by allowing to remain. The laity, therefore, were as little part of the synod as the auditory allowed to be present at the deliberations of any public body can be said to be part of that body.

Whether this was right, or whether the defendant, by desiring to make the laity a part of the body, is doing that which is more consistent with religious principles and more accordant with modern notions—however much I may incline to that opinion—is not the question, nor a question which we can entertain. The question is, was it legal for the defendant to attempt this? And it seems to me that a synod consisting of laity as well as clergy is not a body known in the Church of England. It was not illegal to hold a synod composed of laity as well as clergy, but it was not legal; it was not a synod recognized either by the law or by the practice of the Church of England, and, therefore, the notice of a meeting for the election of delegates to such a synod was not such a notice as the defendant was justified in calling upon the plaintiff to give, telling him at the same time that he would "not discuss its legality with him," and that his opinion on the subject was not worth having, more especially when he at the same time disclosed the object of the projected synod, namely, to be the passing of "constitutions and acts." Under the 25th Henry VIII., cap. 19, synods, if not illegal, cannot legally be called without the authority of the Crown; and, at all events, they have fallen entirely into disuse, having been holden only on one or two occasions, and never for the enactment of canons. Burns, in the passage from which I have already cited, says: "And these, *i. e.*, diocesan synods, were frequently held, while the bishop and clergy lived together in a community, and were not wholly laid aside till by the Act of Settlement, 25th Henry VIII., cap. 19, it was made unlawful for any synod to meet but by royal authority." The act of Henry VIII., cap. 19, declares that the clergy shall not "from henceforth

presume to attempt to allege, claim, or put in ure any constitutions or ordinances, provincial or synodal, or any other canons." That is a distinct substantive enactment against the clergy putting in use any canons whatever already existing, whether provincial, synodal, or "any other" canons, which words, "any other," will embrace diocesan or national, if supposed not to be included in the words preceding them. Then follows an equally substantive enactment, "nor shall" (the clergy) "enact, promulge or execute any such canons, constitutions or ordinances provincial, by whatever name or names they may be called in their convocations in time coming (which always shall be assembled by authority of the king's writ), unless the same clergy may have the king's most royal assent and licence to make, promulge and execute such canons, constitutions and ordinances provincial or synodal."

The defendant says this second enactment applies to Convocation alone, and does not disturb the right to call a diocesan synod, and to pass in them canons,—a right which existed prior to this statute. I think it very doubtful whether the defendant is well founded in this: he may, perhaps, according to the strict interpretation of the terms of the enactment; but according to the intent of the statute, it is obvious that the legislature never could have intended to leave in the lower bodies—the diocesan synods—a power of which it had deprived the larger and more important bodies, the provincial and national synods or Convocations; for, by common understanding among the clergy, they could stultify the enactment by each and every diocese passing such canons as the general clergy could in convocation have made but for the statute. Such an attempt would, of course, have been put down by a fresh enactment, expressly including diocesan synods; and this was so obvious that, although there may have been one or two instances of diocesan synods having been held, there is no instance, as far as we have been informed, of such a synod having since the statute been held to pass canons. Accordingly, Lord John Russell, when inquired of upon this subject in Parliament, repeats the opinion of the law advisers of the Crown, that diocesan synods "were not illegal, because they did not contemplate the enactment of any canon," another form of saying that they would be illegal if they did so contemplate. And the Bishop of Exeter, in his address to his clergy calling the only diocesan synod he ever held, I believe, expresses his "satisfaction" in informing them that "as we

should not attempt, nor indeed wish, to make canons binding even on ourselves, there will be no doubt of the entire lawfulness of the synod." All that the defendant himself can say as to the holding of diocesan synods for any purpose is "that in three sees, and he doubts not in others, if the records could be searched, diocesan synods were held, if not frequently, yet occasionally, up to the period of the Great Rebellion; they have been held in one diocese even in our own day."

Whether Burn is right in saying that the statute of Henry VIII. made diocesan synods illegal, at all events he is right in saying that they have since then been laid aside. It seems to me, therefore, that although it cannot in strictness be said that to hold a diocesan synod would be illegal under the statute, yet to hold such a synod for the purpose of passing canons, *i. e.*, laws or rules, would be illegal, as contrary to the spirit and intent of the statute recognised by long custom and usage in the Church of England. It is obvious that if the laity be introduced into synods which are called for the passing of acts and constitutions, or even if the clergy alone may be called together to do so, without control from the Crown, as in England, the Church in this colony may in time be very much changed from what the Church is in the mother country. I think, therefore, as the notice which the plaintiff was asked to give was not one in the ordinary course, but tended to make an organic change in the Church, the plaintiff was entitled to have an opinion upon the subject, and that, in refusing to give the notice, he was not guilty of any disobedience of which the defendant had a right to complain.

If the pastoral of the defendant had been an invitation of the laity and clergy to meet, with the view of their deliberating together on the propriety of synods, in order that, if they either unanimously or by a large majority should come to be of the same mind as the defendant upon the subject, rules and regulations, binding on all who concurred in them, might be arranged, and an application be made to the legislature, colonial or imperial, for its sanction to these rules and regulations being made binding on the non-consenting, and in all time coming the case would have been a very different one from what it is, and the conduct of the plaintiff in refusing to assist in such an object would have been, to say the least of it, very unreasonable, if not reprehensible. But this pastoral was of a very different character. It ignored the statute of Henry VIII. and the recog-

nition by the whole bench of bishops and clergy of England for centuries, of the application of that statute to the holding of diocesan synods, as well as of convocations, for the purpose of legislation. It ignored also the opinion of the law advisers of the Crown, repeated to Parliament by Lord John Russell, and of the Bishop of Exeter, delivered to his clergy, and merely expressed the defendant's own conviction of the propriety and necessity for legislating through diocesan synods, and gives out his fiat, not for the holding of such a body after a recognised model, none such existing, but for the original creation of such a body after a model of his own framing.

It is true, the pastoral says the synod "will be competent to deal with all matters except those of faith and doctrine, these being already fixed and determined, and not being within the province of such an assembly;" but the exception here is a voluntary, gratuitous limitation by the defendant upon the powers of a body of his own creation; if he might make the body there seems no reason why he might not withdraw the exception, and deal with "faith and doctrine" as well as with "all" other "matters." Indeed, there was no authority but the defendant's own for saying that such subjects were not within the province of such an assembly held within the colony. Having never existed before, the province of the synod, like its creation, was derived from the defendant, and might at his pleasure have been extended to embrace these subjects. I am at a loss to know whence the defendant derived his power to lay down the law for the qualification of voters and of delegates and for the constitution and competency of this mixed body. His letters patent are silent upon the subject, for it cannot come under the words "all the functions peculiar and appropriate to the office of a bishop." The defendant himself says, "I need not say that there is no express law sanctioning the holding of these synods." If there be no "express law," sanctioning the holding of "these synods," *i. e.*, synods composed of clergy and laity, I find no authority for the defendant calling them and fixing the mode of their constitution. I cannot but think that the synod so constituted, when it declared that its resolutions should have the effect of law for those non-consenting as well as those consenting, asserted a legislative capacity, for which I see no reason or ground in law. On the contrary, without expressing any opinion upon the subject, I venture to suggest that the defendant and those who have gone along with him in this matter may perhaps find

it not unworthy their consideration, whether in this respect they have not been guilty of an indictable offence in thus arrogating the powers proper to Parliament alone; for many articles in the constitutions and acts, if they are not in fact legislative, partake very much of that character.

In my opinion, it was contrary to law and to the just rights of the plaintiff, as alleged in his declaration, for the defendant to have required the plaintiff to take part in the proceedings of the two synods, or to consider himself bound by their decisions, and that the plaintiff was not bound, as the defendant prays it may be declared, to give the notice required of him, and that his refusal to give the notice was not a breach of discipline, more especially when one of the laws of the first synod was that no incumbent should be instituted or inducted unless he should agree to be bound by its laws, and according to the defendant's reading of the plaintiff's rights he was not an incumbent already inducted, but an incumbent waiting to be inducted. Diocesan synods held for the purpose of the Bishop and his clergy mutually consulting and advising each other about the discharge of their duties, each in his proper function, are legal enough, and the plaintiff has not disputed their legality. Such synods, the defendant says, have been frequently held in the diocese; and, moreover, he himself asserts that the plaintiff attended one of them, the only one to which he seems to have been summoned. But a meeting of laity and clergy for the purpose not of carrying on a Church already constituted, according to received rules and regulations, but for the building up of a Church, and of making rules and regulations for it, is a totally different thing from a diocesan synod properly so called, and the calling of it is not within the functions peculiar and appropriate to a bishop. That the assistance of the laity towards establishing a church within the colony, which popularly may be called the Church of England, is indispensably necessary, no one can deny for a moment who considers that there is not any permanent provision for the clergy; but the clergy as well as the laity are concerned in the matter, and both equally entitled to have a voice in the matter—to say who they think should be electors of delegates, and who should be delegates, and what should be the powers of the meeting when assembled. The laity have asserted their right to an opinion upon the subject. Several of the larger congregations have, for reasons known to themselves, refused to take any part in the proceeding, the plaintiff's congregation among the num-

ber; and all that the plaintiff has done has been to take the liberty of also thinking and acting for himself in the matter, which, as it is not one coming within the rules prescribed by the Prayer-book, I must think he was entitled to do. Meetings of the clergy and laity, for such a purpose, may be called by the Bishop, as well as by anybody else who should think himself likely to induce them to be held. They are not against the law in any respect, and it is in that sense, I apprehend, that the Colonial Clergy Disabilities Bill, which was introduced into the Imperial Parliament, and there discussed so warmly, was ultimately abandoned by its promoters as unnecessary. Such a bill, to authorize the holding of a diocesan synod called by the Bishop, *proprio vigore* of his office, for the purpose of passing acts and constitutions, and to enforce its being held against the clergy under the canonical obedience they owe the Bishop, would be necessary in the eyes of all, who either regard the Queen's supremacy as extending to the colonies or desire by the framing of the bill to prevent the colonial clergy from passing "acts and conventions" which should make a new church, separate from the Church of England.

Viewed in any light, the proceeding of the defendant against the plaintiff was one of a penal nature; it was essentially necessary, therefore, that it should in every respect be accurate and precise. In the citation the plaintiff is summoned to answer for having refused to give "notice of a meeting to be held in terms of a certain letter addressed and forwarded to you, and dated 1st of October, 1861." In the defendant's letter of 1st October, however, there is not a word about giving notice of a meeting. The pastoral, indeed, said that meetings throughout the diocese would be held on the 8th December, but nothing was said either in it or in the other letter as to the time when notice should be given of the meetings. The expressions in this letter of the defendant of 30th November, therefore, that the plaintiff had, in his letter of 29th November, declined to give notice "nearly a fortnight after the time when that notice was appointed to be given," were obviously inaccurate, since no time had been appointed; but the parties were apparently both so excited that they did not either of them observe this circumstance at the time, and it seems to have escaped observation afterwards, for throughout the correspondence which ensued, and throughout, even, the proceedings in this Court, it was assumed that the defendant had called upon the plaintiff, in his letter of 1st

October, to give a notice, and had specified the time for his so doing; and I had myself supposed that the fact was so, until, on a perusal of the document, I found that the assumption was contrary to the fact in both particulars, and that, not only had not any time been specified for giving notice, but the plaintiff had not even been desired or requested to give a notice at all.

If the proceeding could be looked upon as a judicial one it would not be sufficient, considering its penal nature, to show that the plaintiff might have learnt, and must be held to have known, that a notice might be required to be given, and therefore constructively the defendant must be held to have commanded him to give such a notice, and constructively the plaintiff must be held to have refused obedience to such command. The defendant should be held to the same strictness as in a criminal indictment, and if so, having failed to show that any command such as the citation alleges was ever given, he would, by consequence, have failed to show that such command was ever disobeyed.

This consideration deserves the greater weight from the attempt that was made, but which, I think, entirely failed, to aggravate the plaintiff's supposed offence by showing, from the evidence of Currey and Bebb, that the plaintiff was made aware by the defendant that he was not tied to the particular terms of the notice prescribed to him by the defendant, and that he would exonerate himself by giving the notice in such a form as might meet his scruples, "provided it were a substantial notice of the matter of fact which you were required to announce;" the meaning intended to be conveyed to the Court by this being that the plaintiff, if he thought a meeting called expressly to elect delegates would compromise him, might, if he pleased, have done what Mr. Fry and Mr. Currey did, namely, call a meeting to consider the expediency of electing delegates, and, therefore, the plaintiff was perversely contumacious in not giving either notice. But there never was any command at all; and, of course, if there never were such a command there never could have been any suggestion of a deviation from that which did not exist. There never was any ground, therefore, for the complaint in the defendant's letter of 30th November, 1860, or for the statement in the sentence of suspension that the plaintiff had allowed the time for giving the notice to pass before he intimated his refusal to give it. The defendant, neither in his letter of 30th November, nor in that of 1st December, nor in that of

12th December, gave the slightest hint either that the notice might be of a meeting to *consider the expediency* of electing delegates, or stated in any way what the nature of the notice was. In his letter of 30th November he speaks of "notice of the approaching synod" and the "notice which two months ago I called upon you to give;" in his letter of 1st December he speaks of the "notice which your Bishop has called upon you to give;" and, in his letter of 12th December, of the "refusal to give the required notice;" but in no one of his letters does he say what the nature of the notice was.

The plaintiff was therefore allowed to remain in the idea, which the pastoral, taken in conjunction with the acts of the synod, a copy of which accompanied it, suggested, that the meeting to be called was for the election of delegates, assuming the expediency of such an election as a foregone conclusion. And what passed at the meeting between the defendant and the plaintiff on the 15th of December, at which Messrs. Currey and Bebb were present, did not, according to the account of these gentlemen, alter the matter, for all that passed then amounted to no more than an expression of opinion and an assurance by the defendant that, by giving notice of a meeting for election, the plaintiff would not compromise himself, as the act would be the defendant's, not his, and, this assurance failing to convince, then an intimation that the notice must, nevertheless, be given, though the plaintiff might shape it in any way in which he chose; but not a word was said about changing the nature of the notice from one *to elect* into one to *consider the expediency of electing;* and, if it had been intended that the plaintiff should consider himself at liberty to make this change, it is singular that he was not told so in as many words, either in the letters or at this meeting, inasmuch as both Mr. Fry and Mr. Currey had already, before this meeting of the 15th December, taken the liberty of making this change in the notice.

It was said why did not the plaintiff do as both of these gentlemen did, and as Mr. Fry suggested to him to do? I think the answer to that question was quite sufficient. It is known now, *ex post facto*, that the defendant did not adopt proceedings against either Mr. Fry or Mr. Currey for the course they had followed, which considering the position the defendant had taken in the matter, was as contumacious, one would imagine, as refusing to call a meeting at all, but the plaintiff could not anticipate that the defendant would pass over

their conduct. The defendant had, in his pastoral, disposed both of the expediency and the necessity for holding synods, as questions proper for his consideration alone, and not to be entertained either by his clergy or by their congregations. That he would insist upon this was the view taken by the clergyman of St. John's, who refused to allow the expediency of an election to be put as a question to the meeting of his congregation, and put the names of proposed delegates as the only subject the meeting could entertain.

It was also the view which a minority of the congregation of Wynberg Church took and acted upon, when, after the majority had negatived the question of the expediency of an election, and withdrawn from the room of meeting—without, however, having gone through the form of dissolving the meeting—the minority continued the meeting and elected a delegate. Neither of these elections have been repudiated; on the contrary, both of the delegates sat as duly-elected members of synod.

The plaintiff could not, therefore, anticipate that he might hold a meeting to consider the expediency only of electing delegates, or that his doing so would not have been offensive to the defendant, and, under the circumstances, it does seem extraordinary, though perhaps capable of explanation, that the conduct neither of Mr. Fry nor of Mr. Currey met with the slightest reprehension, and that the plaintiff should alone have been proceeded against. On the contrary, Currey was one of the assessors who sat on the defendant's trial.

I think, therefore, that the defendant has failed in showing that he gave the plaintiff any command in such a form as would have entitled him to proceed penally against the plaintiff, supposing the proceeding to have been of a judicial penal nature, which, as I have said, the defendant had not jurisdiction to make it.

In the course of his argument the defendant said that the plaintiff was neither a rector nor a vicar at the time he was appointed to his cure; that it was beyond the power of the Bishop to constitute a rectory, though that power has since been assigned to him by the synod under certain conditions; that the plaintiff was, in consequence, only a licensed curate, liable to have his licence recalled at the will of the defendant; accordingly, the sentence complained of, among other things, recals the licence which the defendant had given the plaintiff. This cannot be an accurate representation of the plaintiff's

position, for the difference between it and the language of the contract with Hoets is obvious. In that deed the plaintiff is called "clergyman" or "incumbent," whom the defendant covenants to admit, institute, and appoint "as first incumbent," without a whisper as to any want of power in the defendant so to do. Further, the defendant covenants to institute a second incumbent on "the death, resignation or removal for any lawful cause," of the first incumbent. But if the plaintiff was merely a "licensed curate," as the defendant now says, he was liable to be removed arbitrarily, without cause, or the necessity of abiding his death, his resignation, or his removal for lawful cause. In his second argument the defendant, after describing the various offices in the Church of England, without venturing, as on the former occasion, to say which of them was that held by the plaintiff, said, "the form of appointment in this case was by licence, and that licence reserved power to revoke these presents whensoever we shall see just cause so to do." That, again, is is not the contract with Hoets: there is not in it a word about institution and appointment by licence, and still less about that licence being revocable when the defendant shall see just cause. By the contract, the incumbent is to be admitted, instituted, and appointed, and is to remain in till his death, resignation, or removal for lawful cause, *i. e.*, removal by the proper tribunal, whatever it might be, for a cause which, according to law, should be sufficient.

The defendant said, further, "even in England, where everything is defined by law and immemorial custom, it is not always easy to define what a clergyman's position is, and for all practical purposes it is immaterial." In this I perfectly concur, because, whatever may be the plaintiff's correct title in the Church, and I shall not presume to say what it is, certainly, by the contract between the defendant and Hoets, he was a priest of the Church, who in England can compel the bishop to induct him into such living as he may have been presented to, and whom the defendant has, by the contract, bound himself to institute and appoint to the living of St. Peter's, Mowbray, and who, by the form of his ordination as a priest, was entitled, without licence or other authority, to preach and minister the sacraments "where he should be lawfully appointed thereunto.

It may be that the plaintiff has not been formally instituted and inducted according to the received technical rules in England, but it must, in my opinion, be held according to a

trite maxim in equity, that "what ought to have been done has been done," and, as the defendant covenanted to induct the plaintiff, and nothing had occurred to prevent his so doing, it must be held, by what passed on the defendant's part, especially his introduction of the plaintiff to his congregation, that it was intended by him to induct the plaintiff.

The plaintiff, therefore, was, in my opinion, at the time these differences between him and the defendant arose, the incumbent of St. Peter's, Mowbray, duly instituted and appointed by the defendant, and entitled to all the rights and emoluments appertaining to him as such incumbent, whatever these might be, and from the enjoyment of which he can be removed only for lawful cause, as the defendant himself admitted when he said, "he never said he could remove from his cure the priest once placed by him in it without lawful cause;" that is, cause ascertained after trial to be sufficient in law to justify the removal. The defendant may undoubtedly revoke his licence, but the revocation would not have any effect upon the plaintiff; the granting of the licence was unnecessary, and its revocation consequently innocuous.

The sentence of suspension has designated what was done by the plaintiff as a repudiation of the defendant's authority *in omnibus*, as "asserting the position of an independent minister, free from the restraints and laws of the Church of England, exempt from the jurisdiction of the Bishop to whom that Church has committed the charge of government over you;" that is the character ascribed to the protest given in by the counsel for the plaintiff, in the course of the proceedings, against the defendant's assumption of forensic jurisdiction under the letters patent, which is elsewhere in the sentence spoken of as a repudiation of the supremacy of the Crown, although the plaintiff's letter of the 29th November had spoken of the synod being illegal, as not having the authority of the Crown, whose "supremacy in matters civil and ecclesiastical I am bound to acknowledge." I can see no grounds for these imputations against the plaintiff. Every one who takes an interest in the promotion of the Church of England, popularly so called, in this colony, a church which since the arrival of the defendant in the colony, has been so active in the discharge of all the functions proper to it, must acknowledge and admire the fervid zeal of the defendant in that promotion, and give him credit for sincerity and conscience in what he has done; but I see nothing

in the evidence in this case which would justify me in saying that the plaintiff is not entitled to the same credit for sincerity and conscientious love of his Church which the defendant claims for himself, and, in my opinion, is entitled to.

The defendant may have been right in giving the order in question, and the plaintiff may have been wrong in disobeying it, but the motives of both are equally unimpeachable, and the general character in the sentence ascribed to the conduct of the plaintiff, as "criminous and disobedient," seems to me to have been uncalled for and to be unsupported by the evidence.

The defendant, in the conclusion of his address, expressed his apprehension for "the future well-being, if not the very being, of the Church in this land," if this Court should entertain the present question, and said he felt constrained to say that "if the Church should not have freedom in this land, and be allowed to put in force her own laws, and the real office of the episcopate be proscribed, it would be matter of grave consideration whether he ought not to abandon a post the duties of which he was not allowed to fulfil, and seek to exercise his ministry in other lands, where full liberty is granted to her." This is not such an address as, I confess, I should have expected from a person of so cultivated a mind and enlarged understanding as the defendant, since the liberty of the Church is in no respect called in question by the plaintiff, but the power of the defendant over his clergy; and, if it were, such an address could not influence a court whose decisions are to be regulated according to the law, as, in its opinion, the law exists, without reference to what the consequences of its decision may be.

The defendant elsewhere said "the whole system breaks down, so far as we are concerned, if the Bishop is not entitled to call together the synod of his diocese." The right of the defendant to call such a synod has not been disputed by the plaintiff, but his right to call a synod of laity and clergy, and for a purpose not allowed in England to a synod of the clergy alone; and here, again, if the decision of the Court should negative the right to call even such a synod, the consequent breaking down of the system could not influence this Court to withhold its decision.

These are arguments not proper to be addressed to a court which cannot regulate its decisions with reference to the expediency or fitness of things, but is bound to administer the law as it can best find to exist; but since they have been ad-

dressed to the Court, I think it right to notice them, for the purpose of saying that this proceeding is infinitely to be regretted by every one who has at heart the propagation of the Church of England in this colony; for, as there is no provision for the maintenance of that Church in the colony, everything for the accomplishment of that object must be done with the cordial co-operation both of clergy and laity. This might have been attained in time in my humble opinion, if the defendant had continued the course in which he set out, before the Colonial Clergy Disabilities Bill was introduced into the Imperial Parliament, of soliciting the co-operation of the laity and clergy, instead of concussing either of them into the adoption of his views, as this proceeding has attempted to do with regard to the plaintiff. At that time the defendant's views were very doubtful as to the legality of synods; he has since changed them, from a mistake, I think, in his apprehension of what passed in the debates upon the Colonial Churches Disabilities Bill, by applying what was then said in regard to the legality of meetings of clergy and laity, for the purpose of setting up a Church, as if intended to apply to the legality of synods, properly so called. The laity have not changed their opinions, as to the expediency or the legality of synods, I don't know which it is, since it appears that several of the congregations have refused to send delegates to the synods of the defendant, and are not represented in that—for the delegates who have been elected by the minority of these congregations are in no sense delegates from these congregations. Several of the clergy, incumbents of the largest churches of this diocese, have also refused to attend the synods.

In time, both the plaintiff and the clergy and the laity might have modified their views upon this subject, and have been brought to meet each other harmoniously, but every one must see that the present proceeding, whether successful or unsuccessful on the part of the defendant, is not likely to promote that consummation, however devoutly it is to be wished, even as to the clergy alone; for the judgment of this Court, such as I believe it will be, will, in what it accomplishes, be confined to the plaintiff alone, and to such clergy as, like him, may have contracted with the defendant, but will be wholly inoperative as to all other clergymen,—either already in the colony, who may not, like the plaintiff, have contracted with the defendant, or who may hereafter come into it, on the invitation

of the laity. I must think, therefore, this proceeding in every respect infinitely to be regretted, for even success may prove to be defeat.

I am sorry to differ from the opinion just delivered and from that which I believe will be delivered by Brother Watermeyer, but my opinion is that the judgment of the Court ought to be in favour of the plaintiff Long.

S. S. BELL.

MR. JUSTICE WATERMEYER said:

THE duty of the Court in this case is to discover whether the defendant, the Bishop of Cape Town, lawfully possesses the power and authority, which he has exercised of depriving the plaintiff, one of his clergy, who claims to be in the position of an incumbent, of his preferment. In strict language, there is no Church of England in this colony. The Church of England is an established territorial Church, inseparably connected with the constitution of England by the common law and by acts of Parliament, possessed of great privileges from this connection, subject to some disabilities in consequence of it. Members of that Church migrating to this colony leave the dominant established Church behind them; members of other religious communities in England come to a country where there is no privileged ecclesiastical organization, where all religious bodies are, in the eye of the law, on a perfect equality. There was an established Church here once, protected and fettered by the civil authority. For a long time in the history of the colony the Dutch Reformed Church could be considered as an established Church; but, whatever may have been the claims of that Church to this position, these claims were finally resigned when, in 1843, the ordinance which now constitutes its government was enacted.

Until 1847 those inhabitants of the colony who were attached to the doctrines and ritual of the Church of England enjoyed the ministrations of clergymen of the Church of England, who were appointed chaplains and ministers here by the Government. An act of the Imperial Parliament had likewise provided for the ordination of clergymen specially for service in the colonies, and of these some also obtained appointments in this colony. On the 25th September, 1847, her Majesty, by letters patent, constituted this colony, with its dependencies, a bishop's see and diocese, declared that this diocese should be called the diocese of Cape Town, and appointed Robert Gray, D.D., who was duly consecrated by the Archbishop of Canterbury, to be the first bishop thereof. On the 23rd November, 1853, the Bishop resigned, and on the 8th December, 1853, new letters patent were issued, in which it was recited that, on the representation

of the Archbishop of Canterbury that the diocese of Cape Town was of inconvenient extent, her Majesty constituted certain portions of this diocese to be the see of Cape Town, re-appointed the defendant bishop of Cape Town, and further ordained that he should be metropolitan of the new sees of Natal and Graham's Town, which had formerly been part of the bishopric of Cape Town.

In both of these instruments the following clause occurs: "We do declare, &c., that the Bishop of Cape Town and his successors may exercise and enjoy full power and authority . . . . . to give institution, to grant licences to officiate to all rectors, curates, ministers, &c., and to visit all rectors, curates, ministers, &c.; and also to call before him, at such competent days as to him may seem meet, the abovementioned rectors, &c., and to inquire as well concerning their morals as their behaviour in their offices, &c., subject to such rights of review and appeal as are hereinafter reserved."

In virtue of this clause it is maintained by the Bishop in the first part of his argument, that he possesses over his clergy ecclesiastical jurisdiction—jurisdiction of the same force as that committed to this Court from the fountain of justice, her Majesty the Queen, in an instrument of no higher degree of authority than those by which he has been twice appointed; the Supreme Court existing and exercising its jurisdiction over the colony by virtue of letters patent issued in 1834, following previous letters patent which had been granted in 1827. If by these letters patent an ecclesiastical court has been in fact and legally constituted, it is clear that the Supreme Court of this colony is bound to respect the decisions of this ecclesiastical court, is debarred from inquiry either into the form or the substance of its proceedings, is called upon to examine only on complaint that its jurisdiction has been exceeded, and then as to that question and that alone.

The instrument of 1853, by itself, clearly gives no ecclesiastical jurisdiction. It was issued after the constitution of the colony had become law. It could have no legislative effect here. It has never been doubted since the decision of Campbell *v.* Hall, in 1774, when Lord Mansfield delivered his celebrated judgment, that letters patent, legislating for a conquered country after the grant to that country of representative institutions, were in respect of such legislation inoperative.

But the ecclesiastical jurisdiction is claimed in respect of the

etters patent of 1847, at which time representative institutions were not granted to this country, and these letters patent constituting the bishopric and appointing the Bishop were, it is contended, never repealed. A resignation by the Bishop took place in 1853. But it is maintained that the letters patent themselves remained in full force; that the Bishop, appointed metropolitan by virtue of the letters patent of 1853, received his powers as metropolitan, indeed, under these letters patent, but as Bishop of Cape Town retained such powers as he before possessed with respect to that portion of the diocese which still continued subject to the see of Cape Town, after the dioceses of Graham's Town and Natal had been taken from the inconveniently large diocese which had before existed.

If it were necessary to decide whether the Bishop's powers, whatever they may be, exist under the letters patent of 1847 or those of 1853, I believe I should feel no difficulty in arriving at the conclusion that, although there was no actual repeal of the letters patent of 1847, the letters patent under which only his Lordship could claim any authority of the kind here claimed, after his full and perfect resignation of his rights under the former letters patent, were those of 1853; so that he is not at present a bishop of Cape Town by virtue of the letters patent of 1847, but by virtue of those of 1853; and therefore that, on that ground alone, whatever authority he might have had before his resignation, he now had only such power as the letters patent of 1853 could give. But I do not find it necessary to take this view of the question. In my opinion, the letters patent of 1847 give the same authority as those of 1853, and no more; and neither of them gave or could give ecclesiastical jurisdiction of the nature claimed.

It is perfectly true that from 1806, the date of the conquest of the colony, to 1815, that of its cession, and equally from the cession to the grant of representative institutions, the Sovereign could and did alter the laws by letters patent, as well as by orders in Council. This was clearly within the royal prerogative, and admits of no doubt. (Jephson *v.* Reira, 3 Knapp, P. C. C. 152; Campbell *v.* Hall, Cowp. 204; Attorney-General *v.* Steuart, 2 Merivale.) But these letters patent constituting a bishop are not exactly in the same position as ordinary letters patent, legislating for ceded or conquered colonies. The letters patent of 1847 were issued at a time when the power of her Majesty to grant ecclesiastical jurisdiction under such

instruments had been questioned. Former letters patent had professedly given to bishops in the colonies, among them the Bishop of Tasmania, ecclesiastical jurisdiction, with the right of forming courts, subpœnaing witnesses, and passing sentences, which were to be acknowledged by the civil courts in the same manner as the judgments of ecclesiastical courts in England were acknowledged by the civil courts. It was found that this could not be done by letters patent; and I conceive for two reasons—1st. Because ecclesiastical jurisdiction, as in England, derived from the Queen as the fountain of justice, extending, as in England, over the land, could exist only in and be applicable only to countries where the Church of England was established; would be inoperative, and therefore could not constitutionally be forced upon communities where the Church of England was not established; and 2ndly. Because in those of her Majesty's dominions, where only there could be ecclesiastical jurisdiction of this nature, namely, where the Church of England is the established Church, if there be such dominions annexed to the realm of England, there can be no grant of ecclesiastical jurisdiction by letters patent. This latter I believe to be the true construction of the Act 13 Ch. II. c. 12. The act of supremacy of Queen Elizabeth had affirmed the Queen's right by letters patent under the great seal to give ecclesiastical jurisdiction to such persons as she might think fit; to visit, correct, or amend all heresies, schisms and offences falling under the correction of spiritual authority. From this sprung the Court of High Commission, which proceeded in its career of persecution until swept away in 1640 by the Act 16 Ch. I. c. 11. This act, however, likewise took away the power of inflicting certain penalties by the regular ecclesiastical courts. The Act 13 Ch. II. c. 12, passed to explain this act, enacted that the ordinary jurisdiction of the ecclesiastical courts was retained, and expressly declared that the clause of Queen Elizabeth's act of supremacy, by which the royal power to create ecclesiastical jurisdiction by letters patent was affirmed, remained repealed. Wherever the Church of England is established, the Queen, the head of the Church, cannot establish any ecclesiastical court, or give any ecclesiastical jurisdiction by letters patent; where the Church of England is not established, the Queen, the head of that Church, cannot establish in derogation of the rights of her subjects of other Churches, any ecclesiastical court, or give ecclesiastical jurisdiction by letters patent; for such ecclesiastical jurisdiction,

resting on the Queen's ecclesiastical law, could have reference only to a Church establishment, part of the law of the land.

It being found that the jurisdiction given to the Bishop of Tasmania was beyond the power of the Queen's prerogative, other letters patent were issued, which should not give or profess to give the jurisdiction complained against, and ascertained to be illegal. At the same time the letters patent for the bishoprics of Cape Town, of Sydney, Adelaide, Newcastle, all intended to convey exactly the same powers, were issued. Do these letters patent convey the jurisdiction which the letters patent, which were changed on the ground of illegality and impracticability, professed to convey? Certainly not. They were not intended to convey, and do not convey, the power of forming a court, deriving its jurisdiction from the Queen as the fountain of justice, and having a power in certain causes analogous to the power exercised by this Court. There is no jurisdiction here flowing from the Queen, and culminating in the Queen, as is the case with the ecclesiastical jurisdiction in England. They do not make a court of the Queen's ecclesiastical law in this country, where the Queen's ecclesiastical law forms no part of the laws of the country. When the Bishop of Sydney proposed to hold what appeared to be likely to be such a court, he was prohibited by the Supreme Court there, who decided that the letters patent did not confer upon him the authority of being one of the Queen's judges in matters ecclesiastical; and, in my humble opinion, they rightly held this, although I do not concur in all stated by the judges on that occasion. In effect, substantially, the letters patent were not intended to do, and do not, in my opinion, do more than state the royal pleasure that a bishopric should be erected with a certain designation, that a bishop is appointed to discharge the functions and with the authority of a bishop, and that the bishop should be a corporation sole.

Jurisdiction could not be given: jurisdiction rightly flowing from the Queen reaches those who do not consent to its exercise as well as those who do.

I consider the Bishop of Cape Town not in the position of a bishop in England of the Church of England, but a bishop over those who acknowledge him as bishop, bound by the ritual and articles of the Church of England, and entitled to all such authority over those who acknowledge him as their bishop as can be discovered to belong to a bishop of the Church of England, apart from any authority he may possess as bishop of the

Church establishment of England. Her Majesty has appointed him by letters patent, and this appears to be her undoubted prerogative. If the appointment had been not by letters patent—which seem to be important principally as creating a corporation sole and perpetual succession—inasmuch as the fiction of a corporation sole is unknown to the law of the colony, and a systematic succession to office, and the separation of public from private property, can be perfectly effected without this fiction, he would be equally a bishop with exactly the same episcopal power. The title has been given by her Majesty, and has been acknowledged by the legislature of the colony. It is not contrary to the law that a bishop not of a territorial Church of the colony should receive from her Majesty a territorial title. But the Bishop of Cape Town is not, and cannot be, exactly in the same position as if he were a bishop of an episcopal see, territorially designated, in the territorial Church of England. He has not their secular privileges; he has not their ecclesiastical jurisdiction. He is, as stated by Lord Campbell in the judgment of the Court of Exchequer Chamber, in the Queen *v.* Eton College, of the Bishop of Christ Church, New Zealand, a Protestant bishop, canonically consecrated and holding the faith of the Anglican Church. He cannot be said to have any jurisdiction except over those who voluntarily submit to his jurisdiction.

I have endeavoured briefly to describe the position of the Bishop of Cape Town. I shall now endeavour to point out the plaintiff's exact position.

The plaintiff was ordained by the Bishop of London under the Act 59 Geo. III. c. 60, for service in her Majesty's foreign possessions. Being in deacon's orders, he was appointed by the Governor of the colony a minister of the English Episcopal Church at Graaff-Reinet. This was in 1845. In 1848 he sought ordination as priest from the Bishop of Cape Town, then on his visitation tour round the colony, and he then was admitted into the holy order of priesthood, according to the manner and form prescribed and used by the Church of England.

The plaintiff, having before this had no licence except the letters of orders granted him by the Bishop of London in 1844, received from the defendant the licence which has been read.

He continued in the performance of his duties at Graaff-Reinet until 1854, when there was a treaty between the Bishop

and the Rev. J. W. van Rees Hoets, which resulted in the transfer by Mr. Hoets to the Bishop for ecclesiastical purposes of a church built by him at Mowbray, on condition that for the first two incumbencies the right of presentation should be in Mr. Hoets, and with an engagement that the Bishop would consent to the exercise of his patronage in the appointment of Mr. Long. This engagement is so distinct, that in the construction of the agreement between the Bishop and Mr. Hoets of the 23rd November, 1854, the name of Mr Long may be considered as inserted "as the clergyman or incumbent to be appointed and instituted to the charge of the said church and parish." This is to be Mr. Long's position in consideration of the gratuitous transfer of the church, and endowment, as it is called in the agreement, for the first two incumbencies. Mr. Hoets gave transfer on the condition, among others, that Mr. Long should be incumbent of the parish church of Mowbray. And having so accepted the church, and having accepted Mr. Long as the first incumbent, whether actually all things have been done which were necessary for an institution in England or not, the Bishop is bound by the equitable rule, that all things are considered performed which ought to be performed: and as far as he is concerned, and Mr. Long is concerned, and Mr. Hoets is concerned, Mr. Long was to all intents and purposes an incumbent,—whether to be called rector or not does not matter, and whether or not all the formalities required for institution in England had been followed or not. At least he was not, and could not be in terms of the engagement entered into with Mr. Hoets, merely a licensed curate. Whatever were the difficulties which the Bishop felt about the status of his clergy, which difficulties seem to have been among the motives that led him to call the first synod, these difficulties could not relieve him from his contract with Mr. Hoets, who was to have the presentation "subject to such conditions and limitations under rights of patronage and presentment to benefices as in England are exercised and held by lay patrons thereof," nor from his contract with Mr. Long that he should be a beneficed clergyman, an incumbent—not merely a licensed curate, subject, as licensed curates are by the form of the licence, to revocation of their licences far more summarily than beneficed clergymen are to deprivation of their benefices.

It was with reference to this that I required that Mr. Hoets should have, if he desired it, an opportunity of intervention.

With the contract before us, the Court could not accept the Bishop's conclusion that Mr. Long was merely a licensed curate. If he was not an incumbent, Mr. Hoets would have a right, on the revocation of the licence, to claim that he should now exercise his power of presenting to the first two incumbencies, inasmuch as no incumbent had yet been appointed, and no effect had been given to the contract. If he was an incumbent, then and then alone the question between the plaintiff and the defendant, as to whether the former had been lawfully deprived, was a question between the Bishop and the clerk, with which the patron had nothing to do. But on the question raised on the face of the proceedings, whether the contract to institute to an incumbency had been carried out or not, it was necessary that an opportunity for intervention should be given. Of this contract between Mr. Hoets and himself, the Bishop could not constitute himself the judge. The acceptance of the licence by Mr. Long does not affect the contract, that the latter should be a beneficed clergyman, and not a mere licensed curate. Now that the status of Mr. Long is ascertained, namely, that he is, in respect to his Bishop, entitled to the rights of an incumbent as nearly as these rights in the established Church of England can be transferred to the non-established Episcopal Church at the Cape of Good Hope, the question resolves itself into that of the Bishop's right of deprivation of this incumbent, or removal for lawful cause, as stated in the deed of agreement; and Mr. Hoets, the patron, has no further connection with the case.

The position of the plaintiff and the defendant, then, would appear to be, that the latter is a Bishop of the Anglican faith in this colony, and the former a clergyman in a position analogous to that of an incumbent, who acknowledges him as bishop, acknowledged him as such when admitted to the priesthood, and again acknowledged him as such when he accepted from him what is substantially institution to a benefice. This bishop has not ecclesiastical jurisdiction as have the bishops in England; he cannot have it in that sense where episcopacy is not the established religion and the law of the land. In the English sense, no ecclesiastical courts exist here. But though the letters patent give no jurisdiction, in the strict sense of the term, they give by the nomination of a bishop—and any other appointment of a duly consecrated bishop would give that bishop—a capacity for jurisdiction over such as should submit to such jurisdiction.

In England, where episcopacy is the law of the land, bishops have jurisdiction by the law of the land, which includes the law of the Church. Bishops proceeding from the Church of England to a country where episcopacy is not the law of the land, and where the Church which holds the doctrines of the Church of England is in the same position as other denominations of Christians, claim authority over the presbyters who acknowledge their jurisdiction; it is admitted that they have authority. What is the extent of this authority?

It is the duty of the Court to dissever the law of the Church in England from the law of the Church establishment of England; and having discovered the law of the Church, if possible dissevered from the law of the land, to apply it to the present case.

By the law of the Church binding him and the plaintiff, it is contended by the Bishop in this division of the argument that he has done no more than he was justified in doing, and that interference by the Court would be an infraction of the rules, not illegal in this colony, which bind equally the plaintiff and himself. The plaintiff maintains that there can be no law of the Church binding them both, even where the Church is not established, except in strict conformity with the law of the established Church in England; that although he is anxious to pay all fitting respect to the office of the Bishop, his respect for the laws of the English national Church, to which both belong, is greater: that he was required to do something which he believed to be contrary to the law of the National Church of England; that his refusal to do what he believed to be so contrary was not a breach of the canonical obedience which he owes, and which he has always been prepa ed to pay. Having, for the refusal to obey the illegal requirement, been subjected to what he deems to be an illegal exercise of an assumed jurisdiction, he claims from the Supreme Court in the jurisdiction of which both he and the Bishop are, that the proceedings of one who has held a court as an ecclesiastical judge, having no valid authority from her Majesty the Queen to perform the office of such a judge, shall be declared of no force or effect.

The difficulty of the question is evident. This is not the ordinary case between the superior authority and a member of a voluntary association, where a reference to the rules of the association would at once render clear the duty of the Court,—as was the proceeding between the Wesleyan body and Dr. Warren.

There exists here the anomaly of an established Church in one country transplanted to a country where it is not established,—governed by laws in the land of its establishment which are not the laws of the country to which it is transplanted,—not ruled at all as a voluntary association in England, but to which the principles of voluntary association, if there are to be any rules at all, must be applied here.

But however difficult it may be, the court must endeavour to ascertain how far the Bishop is justified in the exercise of the power which he has claimed as to this presbyter,—how far the presbyter is entitled to demand the protection of the Court against the exercise of this power. The Bishop claims jurisdiction as a judge. He has it not in the legal sense. But has the plaintiff consented to his jurisdiction, so as to enable him to exercise over him the power, substantially, which a duly constituted episcopal court, with territorial jurisdiction, could exercise over him in England?

This leads me to the necessity of inquiring what is Episcopal Church government, in a sense equally binding on the defendant and on the plaintiff,—the latter a presbyter, the former a bishop of an Episcopal Church not in England, but holding the faith of the Church of England.

In the Church of England, some are of opinion that episcopacy is of divine institution,—some that it is of immediate apostolic institution,—some, believing it to have existed at a very early period, even during the lifetime of some apostles, hold the view of St. Jerome, that its origin is to be assigned to the dissensions among Christians which seemed to require stronger coercive authority than at first existed; but all members of the Church of England agree that it is not contrary to the word of God, and all are bound to yield to the rightful authority which the Episcopal Church government, on whichever of these foundations built, confers upon bishops.

Is the Bishop of Cape Town—apart from any judicial authority professedly conferred by the letters patent—a judge in causes of ecclesiastical discipline, over those who acknowledge him as their Bishop in this diocese? And what rules is he bound to adopt in such cases?

In England, the Bishop is plainly a judge, though exercising jurisdiction often through commissaries or chancellors, according to the forms limited by law, and, in fact, from the position of the Church of England, one of the Queen's judges. He has always

held the position of a judge as to his clergy. The Reformation did not, in principle, change the relation of the bishop towards his clergy. Within his diocese he was, before the Reformation, the judge, and equally after the Reformation. It is perfectly true, as maintained by the plaintiff, that the universal canon law never was admitted to have the authority in England which it possessed in some European states. The Commissioners on Ecclesiastical Law, in 1832, including the Primate, the Bishops of London, Durham, Lincoln, St. Asaph and Bangor, together with some most eminent common law and ecclesiastical judges, lay down distinctly that "in England the authority of the canon law was at all times much restricted, being considered in many respects repugnant to the law of England, and incompatible with the jurisdiction of the courts of common law: so much of it as has been received, having obtained by virtual adoption, has for many centuries been accommodated by our own lawyers to the local habits and customs of the country, and the ecclesiastical laws may now be described, in the language of our statutes, as 'Laws which the people have taken at their free liberty, by their own consent, to be used among them, and not as laws of any foreign prince, potentate, or prelate.'" Neither English statutes nor English canon law are law in this colony, nor is foreign canon law; but the relation between bishop and priest, proceeding from the Church of England to this colony, must be governed, on the principle of a contract, by the English ecclesiastical law, in as far as it can be rationally applied, and not by what is called the universal canon law. When the universal canon law differs from or has been overruled by English ecclesiastical law, we should be bound to hold that in their relations to each other, the clergy in this colony have contemplated the principles of the law of their own country in as far as applicable here,—not those which have, in some respects, never been acknowledged or admitted in their own country, and of which they are not bound to have knowledge.

But in this particular, the canon law, as acknowledged in England, has never differed from that which prevailed generally in Europe. Whatever the opposition offered to the usurpation of secular jurisdiction in clerical courts, it was never doubted that in spiritual causes in their own dioceses, and as regarded their own clergy, bishops were by law and custom the judges. They were so in England not only from the fact of the Church law being part of the law of the land,

but because the constitution of the Church gave the position to bishops.

The same Ecclesiastical Commission to which I have before referred, after speaking of the delays and expense attendant on ecclesiastical proceedings (now amended by the 3 & 4 Vict. c. 86), give thus from Oughton, Clarke, and the *Politia Ecclesiæ*, the position of bishop and priest in England (Rep. of Eccl. Comm., p. 54):

"In ancient times the authority of the bishop over his clergy was enforced by the exercise of his voluntary jurisdiction in what was termed his '*forum domesticum*,' by private inquiry or inquisition, with little restraint from the forms observed in contentious suits in courts of justice.

"The mode of proceeding in such cases, as far as it can now be traced, was very summary. The bishop acted on the presentment of the churchwardens or on information obtained in his visitation or in other authentic form. The alleged offender was cited to appear before the bishop to answer to articles or charges in writing exhibited against him. He was required to make answer on oath and to produce as compurgators a certain number of his neighbours who were acquainted with his course of life, and who were able to swear they believed him innocent of the charge against him. If he refused to answer he was reputed guilty *ex confesso*, and was punished by admonition, suspension, or deprivation, according to the nature of the offence."

However modified by legislation in England, this remained in principle the position of the bishop and his clergy: he was the judge in matters of ecclesiastical discipline in his diocese. And the fact of his becoming in England a judge administering the ecclesiastical law of the land, because the Church is there established and part of the law of the land, is accidental, not essential. When, therefore, his Church ceases to be an established Church, or, as in the present instance, members of a Church which is established in one country have a Church organization in a country where it is not established, that Church organization being presided over by a bishop whose functions have been described,—who but the bishop is to be the judge of purely ecclesiastical offences?

Has Mr. Long acknowledged this jurisdiction, which is not territorial, but personal, over those who acknowledge it? To this the reply is: He has been ordained priest by this bishop;

has taken the vows of canonical obedience to him; has both at Graaff-Reinet and at Mowbray, in his oath of allegiance, described himself as in the diocese and jurisdiction of Cape Town; has acknowledged the Bishop as his ordinary by accepting from him what the Court holds to be equivalent to institution, and in acknowledging him as his ordinary, and accepting from him institution, has acknowledged him as his judge in matters of ecclesiastical discipline. If we take the letters patent at their lowest possible value, they are an announcement in the *Gazette* of the arrival of a bishop in the colony, consecrated by the Archbishop of Canterbury, who, with reference "to those whom he may institute to benefices," will claim to exercise the right, which an ordinary who in England institutes to benefices has, of being a judge in causes of ecclesiastical discipline. After this announcement, the institution to the benefice is accepted, but the jurisdiction of the ordinary is not equally accepted with the institution.

The word "ordinary" itself is of peculiar significance. It is a term borrowed from the civil law into the ecclesiastical. In connection with bishop it signifies not merely one who has the episcopal functions of ordaining, confirming, &c., but a bishop who is a judge of his clergy. After the conversion of Constantine, the power of the episcopate greatly increased; its connection with the state gave it new authority. Whatever influence bishops had before exercised, they now discharged a public office—a "*munus publicum*;" and that which in strictness can flow only from the head of the state, "jurisdiction," became theirs. Whether Christians had departed from the primitive simplicity of the Church or maintained the faith in its original purity, all Christians then were episcopal. Their jurisdiction, as defined by the imperial legislation, came to be known as "ordinary," "consensual," and "delegated." (Grotius de Imp. Summ. Pot. circa Sacra, c. ix, § 11, 12, 13.) The ordinary jurisdiction in the fourth century related wholly to religion and clerical discipline; in the words of the rescript of Valentinian III., in the year 358: "*In causâ fidei vel ecclesiastici alicujus ordinis eum judicare debere qui nec munere impar sit, nec dissimilis.*" A law of Valentinian II., Theodosius and Arcadius in the Theodosian code, is: "Questions of the Christian religion ought to be litigated before that judge who is the chief (præsul) of all the priests in those parts." Justinian finally, about 540, withdrew cognizance of such causes wholly from the secular tribunal

(Nov. 83, c. 1): "If the offence be ecclesiastical, needing ecclesiastical chastisement and penalty, let the bishop give his decree, the judge of the province by no means mixing in the cause. For we will that the civil judges shall have no cognizance of such things, since it is meet that they should be ecclesiastically examined." In another place (Nov. 123, c. 21 fin.): "If the cause be purely ecclesiastical, let the civil judge have no connection with such inquiry, but let the bishop finally decide."

Again: "Ecclesiastical causes shall be heard only by the bishops, or metropolitans, or the synods, or the patriarchs." (Grot. c ix., § 11).

This—says Grotius in his treatise on the "Authority of the Sovereign Power in Sacred Things"—was the ordinary episcopal jurisdiction, that in which the bishop was *judex ordinarius* —*i. e.*, as explained by Voet, exercising the jurisdiction (Voet, 2, 1, 6) "*quæ alicui jure magistratûs seu jure ordinario et more a majoribus recepta*," to whose office such jurisdiction was of right considered to belong.

The consensual jurisdiction, which related in the first instance to secular causes, by consent of both parties, both being clergy, brought before the bishop, and then to causes between laymen and clerks, likewise by consent, heard by the bishop, and which afterwards expanded into those inordinate claims of clerical jurisdiction to which more than one revolution in the period which has elapsed since its introduction may be traced, and the delegated jurisdiction which was purely secular, delegated by authority, need not be further mentioned here.

From this period forward all episcopal Churches deriving their episcopacy through the Church for which these laws were made, whatever their differences in other matters, have acknowledged this ordinary jurisdiction in the bishop of the diocese. And from that time to this it is plain that in established epi copal Churches the ordinary has had of right a jurisdiction in all ecclesiastical questions over his priests. It would seem to follow that a priest, acknowledging his bishop as ordinary where a Church is not established by the sanction of law, implies that he consents to his bishop's exercising over him, as far as the law of the country will allow, jurisdiction of the nature just defined.

I have been rather minute on this point, because I believe that no authentic historical warrant exists for the claim of jurisdiction in its proper sense before the imperial grant of jurisdic-

tion in the fourth century. Probably, as stated by Godolphin (page 23), at this time the "bishop was universal incumbent of his diocese, received all the profits, which were but offerings of devotion, out of which he paid the salaries of such as officiated under him, as deacons and curates, in places appointed." Up to this time, probably, Dean Milman's conjecture is correct, "that the sanctions of the Christian jurisprudence were altogether religious; they rested on opinion, on the voluntary submission of each individual mind to spiritual authority. The punishments and rewards were properly those only of the life to come."

But it has been argued that for the authority of the bishops and the claim of jurisdiction we are not to go back further than the reign of Elizabeth, or, at furthest, of Henry VIII. For this case it is not necessary to go back to the more remote period; but I do not concur in this view. In endeavouring to understand the historical meaning of the jurisdiction claimed by the ordinary, I have traced it to its origin, not from the Roman canon law, because that is a source which would not be satisfactory to litigants claiming to be of the Church of England; but I have referred to civil laws, authentic and extant, of the 4th, 5th and 6th century, giving an unimpeachable account of the episcopacy from which the episcopacy of England, through Augustine, is derived, and I quote these not as laws, but as historical evidence of a fact.

But further, the status of beneficed clergyman or incumbent arose in the same period as that from which the references for the episcopal authority are drawn, and historically the one must be understood for the due comprehension of the other.

When Eusebius wrote in the fourth century, lay patronage and its effects did not exist. The universal incumbency of the bishop apparently was modified in the sixth century, and the earliest extant laws on the subject are, I believe, those in the 57th and 123rd "Novellæ Constitutiones." It is to these novels, I presume—though his dates are not quite accurate—that the Dean of Chichester, in his "Lives of the Archbishops of Canterbury," seems to refer, when speaking of Theodore, Archbishop of Canterbury, in 669, he says, "He determined to encourage the erection of parish churches by adopting the principle laid down by the Emperor Justinian in the laws which he published in 541 and 543, according to which the right of patronage was

conceded to the founders of churches and their heirs, provided that the church had a specific income for the maintenance of the ministers."

These novels are—the 57th, c. 2, of 555: "This, likewise, we decree to the honour and worship of thy see (this is addressed primarily to the metropolitan of Constantinople): whoso shall have built a church and shall desire to appoint the clerk, to him is by no means to be intrusted the right of bringing such as he pleases to your reverence for institution (*ad ordinandos eos*); but they are to be examined by you; and according to your judgment, and that of those who after you shall govern the see, they shall receive institution who appear to your reverence and your successors fit and worthy of the ministry of God, that the sacred things of God be not profaned."

And the 123rd, c. 17: "Whoso shall have built a house of prayer and desires for himself and his heirs to appoint (statuere) clerks in it, if they make provision for the stipends of the clerks and nominate persons who are worthy, let them be instituted (*ordinari*). But if those who are selected are by the sacred rules prohibited as unworthy, let the bishop provide such as he thinks better to be instituted."

Up to the sixth century, then, no patrons and incumbencies seem to have existed. In the seventh century they were introduced into England. In ascertaining the relative position of ministers and bishops, on principles applicable to the position of a church emanating from England, it is not unimportant to consider that incumbents came into existence long after bishops —whether bishops be of the apostolic age or not—and that, when incumbents came into existence in episcopal sees there was no doubt of the existence of the jurisdiction of the ordinary over his clergy. Whether or not bishop and presbyter were originally of equal authority, at the time when incumbencies were created, the bishop was plainly *judex ordinarius*.

Nor was this episcopal jurisdiction in England an assumption of papal episcopal authority. During the very episcopacy of Theodore, the supremacy claimed by the papal see was so little regarded, that on the appeal from a decision of the Archbishop to Rome by the Bishop of York, the latter was condemned to imprisonment for having committed the public offence of appealing from his own clerical superior to a foreign authority.

It is clear, at least, that while we are not driven to inquire whether the episcopacy of the fourth and fifth centuries was

that of the first, or to decide to what extent the Apostolical Canons or the Ignatian Epistles are spurious or genuine, the episcopacy of the fourth and fifth century, whether it be that of the first or not, is that which was transferred to Saxon England by the missionary bishop Augustine at the end of the sixth century; which soon displaced the older British episcopacy, then in a state of extreme depression, and which continued thence to the Reformation. Historically, it is the episcopacy of England at the present day. From that time the episcopacy of the nature prevailing in the Church of England and incumbencies of the nature of that which is now in question have existed together: there has been jurisdiction allowed to and exercised by the bishop as to all the clergy under him; he has had the power of admonishing, suspending, depriving, provided he lawfully exercised this power. Many think episcopacy an assumption of sacerdotal dignity not warranted by the word of God, nor expedient. But clergy who admit episcopacy in the Church of England, or in the church from which the Church of England was finally separated in the sixteenth century, cannot historically admit episcopacy without episcopal jurisdiction in the ordinary to whom they profess themselves subject, and this episcopal jurisdiction, among other things, *clericos ordinandi, citandi, suspendendi, removendi.* (Huber. de Jure Civit., lib. ii. sec. iii. cap. vii. § 6—Wissenbach—Exercit. ad Pand. Disp., xvi. l. v. § 21—Grot. de Imp. Sum. Pot. circa Sacra, c. ix. § 14—Report of Ecclesiastical Commission, p. 54.) Even at present, amid all the incidents of an established Church which is parcel of the law of the land, with its ecclesiastical jurisdiction chiefly committed to laymen in England, as if to mark the peculiar function of the bishop as ordinary, the bishop's chancellor or commissary may by the canons of 1603, perform all the functions which the bishop as ecclesiastical judge possesses, but the bishop alone can deprive.

I take, then, the acknowledgment by a minister of the Church of England, or ordained for the colonies in connection with the Church of England, of a bishop over him and the other clergy in the country where he is minister; and where the Church of England is not established, to be an acknowledgment that this bishop has over him jurisdiction, and that in this jurisdiction is included the right of admonishing, suspending, depriving, and that such admonition, suspension, deprivation ought to be for reasons which would suffice for the purpose in England.

But can this voluntary submission to jurisdiction give the

jurisdiction itself the same quality which jurisdiction of a court duly constituted by the sovereign has? Certainly not. In that case Sir Lancelot Shadwell, in the first instance, and afterwards Lord Lyndhurst, would not, I believe, have heard Dr. Warren's application at all against the Wesleyan judicature. They did require the rules, for it was to be ascertained whether these were against the laws of the land; and they inquired, further, whether the applicant had had the benefit of them, and having ascertained that he had, they dismissed his application. If the application had been from a clergyman of the Church of England, deprived by the proper tribunal, the Queen's ecclesiastical court, the Court of Chancery would not have entertained the application at all.

In the Cardcross case, the Free Church of Scotland having dismissed Mr. Macmillan, in the action which he brought in the Court of Session it was excepted that the court was not competent to entertain the cause, as he had submitted to the jurisdiction of the association. But all the judges held that there must at least be inquiry as to what were the laws of the Free Church association, and whether the proceedings had been in accordance with these laws. A voluntary association, clerical or otherwise, may have the power of deposition, but may not exercise that power in violation of their own rules; and therefore the courts of justice must be satisfied of these rules, and that the proceedings were in accordance with them.

In the case of the French Protestant Church, Daugars *v.* Rivaz (Jurist, 6, N. S., p. 854), the Master of the Rolls found that the governing body which had, as he admitted, the power of dismissal of a pastor, had this power of dismissal only on certain grounds, and that the grounds on which the alleged dismissal had taken place were not any of these grounds. He therefore restrained the consistory from interference with the plaintiff in the exercise of the ministry of his office.

All these cases have this principle in common, that courts of justice are bound to protect the authorities of all voluntary associations in the due exercise of their powers,—to protect the members of voluntary associations against the undue exercise of power by the heads.

It has been shown that the power of deposition or deprivation exists in the Bishop. Has this power been exercised according to the laws of the association to which both the plaintiff and defendant belong? Have the proceedings been in accordance with such laws? If the proceedings have been so in accordance

in a matter rightly belonging to spiritual jurisdiction, can the defendant complaining of the judgment make any appeal except to the Archbishop of Canterbury?

I am content to accept the appeal to the Archbishop of Canterbury in favour of any one of the clergy who may have been condemned by the Bishop for a spiritual offence, according to the rules of their association: it is a protection which may be of importance to the clergy, and inasmuch as the rule in matters ecclesiastical is that pending an appeal execution is suspended, it may be of the last moment to a clergyman. When, by the publication of the letters patent, taken in the sense in which I have suggested they should be taken, the Bishop informed those who were about to become his clergy that on becoming his clergy, and accepting any office from him, they subjected themselves to his jurisdiction, he informed them likewise that the Archbishop of Canterbury would be their protection against any wrong done by him; and it is part of his contract with the clergy that they should have this safeguard.

But there are matters which it is impossible for this Court to allow to be referred to the Archbishop of Canterbury without an abdication of the functions which, by her Majesty's commission, we are bound to discharge. The origin of the differences which have led to this litigation was a direction by the Bishop to the plaintiff to give a certain notice, which was disobeyed. Now, this presbyter or incumbent is bound to the Bishop in canonical obedience, in all things lawful and honest. If the notice were one in which the congregation was invited to do an illegal thing, or to join with others in doing an illegal thing, and the incumbent refused to aid in the invitation to an illegality, and therefore was cited and sentenced, it would be the duty of the Court to protect him in his obedience of the law. The Archbishop of Canterbury, although the patriarch of the colonial sees, is not the Queen's judge of the laws of any of the colonies. He could not be a competent judge to know whether the law of this colony permitted or disallowed diocesan synods without the sanction of the Crown. The Queen has not made him such a judge, and a voluntary submission to his jurisdiction in matters ecclesiastical cannot constitute him such a judge. If, indeed, the letters patent had the effect, which the Bishop contends they have, of creating a court with legal ecclesiastical jurisdiction here, and a court of appellate jurisdiction in the Archbishop, the Archbishop would be the only court to which an

appeal could be made, even on a point of local law incidentally arising in an ecclesiastical cause, and in this respect would be a court to adjudicate on the laws of this colony. But as in the unanimous opinion of the bench, the letters patent have not this authority, the Archbishop is no court, and, in our opinion, no mandamus to hear an appeal from the Bishop of Cape Town would lie. His is a voluntary jurisdiction, and to that voluntary jurisdiction we cannot permit an inquiry as to the laws of the land to go. If, in the case of Dr. Warren, it had appeared that he was deprived for having refused to do something prohibited to be done by the law of England, Lord Lyndhurst would not, I consider, have entertained any respect for the voluntary jurisdiction which was carried into effect for the violation of the law of the land.

I say, without hesitation, that if the voluntary jurisdiction which I am of opinion the Bishop possesses over Mr. Long, even to the extent of deprivation for lawful cause, had been called into exercise because Mr. Long refused to combine with the Bishop and others of the clergy in an illegality, the basis of the voluntary jurisdiction would fail. A condition, on which the canonical obedience was promised and the voluntary jurisdiction submitted to, would have been broken, for canonical obedience must presume legality, and submission to the jurisdiction of the same person to whom canonical obedience is due presumes that there shall be no exercise of such jurisdiction when the order to which obedience is claimed contemplates an illegality.

In such a case, repudiation of the submission to jurisdiction would not be justifiable merely, but would demand the protection of this Court. An *imperium in imperio* with the right to enforce an illegality could not have been maintained. With every due regard for the Bishop's ordinary jurisdiction over clergy submitting to him, the Court could not withhold its protection from a clergyman thus wronged.

I add that if the order given required not a violation of the law of this country, but a violation of the contract, on which the voluntary jurisdiction was founded; for instance, if an attempt were made to effect changes in the common prayer so as to substitute another Book of Common Prayer for that in use now, the very fundamental principle on which the submission to voluntary jurisdiction was yielded would be so departed from, that the Court would be bound to protect a clergyman adhering to the contract between himself and the Bishop, honestly

refusing to depart from it, and punished by a jurisdiction that, but for the contract departed from, would have no existence.

I illustrate what I mean by the well-known case in the Court of Session of Scotland between Sir W. Dunbar and Bishop Skinner, of Aberdeen. Sir W. Dunbar had a living in Scotland, was a clergyman of the Church of England, and not subject to the jurisdiction of the Bishop of the Scottish Episcopal Church in that part of the country. By contract he agreed to place himself under this jurisdiction, but, after some time, believing that the conditions of the contract had been broken by the Bishop, he withdrew from the contract, and considered himself in the same position as before. The Bishop proceeded against him episcopally, and at length excommunicated him, publishing the excommunication. An action for libel was brought by Sir W. Dunbar against the Bishop. The Bishop pleaded that all this had been done in the assertion of his episcopal jurisdiction, and that the civil court could take no cognizance of spiritual matters. The court held that the question arose whether the Bishop at the date of the excommunication had any spiritual jurisdiction over this clergyman. This question was referred to a jury, who, being of opinion that the Bishop's spiritual power had ceased by his own act and Sir W. Dunbar's withdrawal, gave damages, treating the published excommunication as an unwarranted libel, to the extent of £2,000.

But as I have already stated that if the origin of these proceedings had been an attempted illegality on the part of the Bishop in which Mr. Long refused to join, I should be of opinion that Mr. Long was entitled to protection against the jurisdiction to which at his institution he had submitted, but which in this particular matter he would be entitled to repudiate,—I must state as distinctly that the instruction of the Bishop that Mr. Long should give notice of the approaching synod was not an order to do something illegal or contemplating illegality, that the calling of the synod was not, in my opinion, a breach of the conditions on which the presbyter promised to pay canonical obedience to his Bishop and to submit to his jurisdiction.

I. There is no law of this colony against the assembling of any religious association of any denomination for the purpose of regulating the internal affairs of that association. No doubt, according to the opinion of some of the Dutch lawyers, all meetings for ecclesiastical purposes, of whatever denomination, required the direct sanction of the sovereign. But this theory of

the headship of the state over all the churches of different denominations in the country was merely a theory in the most tolerant country of Europe. To the State Church such a rule could apply; to no others. If it be supposed that the colonial proclamation of 1822, relating to public meetings without the sanction of the Government, could ever have applied to such a meeting as this, the repeal of that proclamation by ordinance No. 15, 1848, renders all meetings, whether for political or ecclesiastical or other objects, perfectly legal. Illegal proceedings at such meetings, like illegal proceedings elsewhere, come under the cognizance of the proper tribunals; but men are entitled to meet, to discuss, and to act in the particular affairs for which the meeting has taken place.

II. There was no breach of the fundamental contract between the Bishop and each of his clergy which requires adherence to the laws of the Church of England and Ireland, in as far as they are applicable to the position of the Church in a country where it is not established, in the meeting at the Bishop's direction of such a diocesan synod as was the synod of 1860 or 1856. The Act of Submission of Henry VIII. has no reference to diocesan synods. The application of the 12th canon of 1603 to the case of diocesan synods was plainly an error, conscientiously believed to be a truth, which has been the chief occasion of these unhappy proceedings. The power of calling diocesan synods rested with the bishops of the Church of England after, equally as before, the Act of Submission. That they were rarely convoked after the Act of Submission makes no difference; the right to convoke them remained. Neither the common law nor the statute law supremacy is infringed by the holding of such a synod. Both the plaintiff and the defendant are bound by the supremacy of the Crown, whether by common or statute law, in as far as applicable to the established Church of England modified into an unestablished Church here; and the holding of a synod is no infraction of such supremacy in any sense.

But a graver objection is made to the diocesan synod. A lay element such as has been introduced into these colonial synods is unknown in England. The passage concerning laymen in the "Reformatio Legum," it has been justly remarked, does not speak of laymen introduced by election into synods, with rights of voting, but rather of certain selected laymen as auditors. Mr. Long himself made no objection of this nature. His complaint was not of the constitution of the synod, but of its exist-

ence. Probably, if he had felt that he could in conscience take part in a synod, he would have preferred the existence of the lay element. He feared that the supremacy of the Crown was infringed, and in this fear he acted. But yet, if this assembling of a synod in which laity take part be illegal or against the contract, Mr. Long is now entitled to the advantage which this would afford him. After the best consideration which I have been able to bestow on this portion of the case, I have not been able to find that the introduction of the lay element into a diocesan synod is at variance with the nature of such a synod. In a diocese such as this is, where the anomaly of an established Church which must exist as a voluntary association, if at all, is exhibited,—where an off-set of the Church of England is to strike root in a wholly different soil from that in which the parent tree flourishes, in order to keep the character of parent and offspring as nearly as possible the same, there must be a different course of action in some respects: allowance must be made for varied circumstances, in order that the two shall be, as closely as can be, one.

Unless it be laid down authoritatively in some law of the Church that laymen shall have no access to diocesan synods, or it be clearly in breach of an agreement that they should, I should consider that, in a new diocese in the peculiar position of that of Cape Town, where this Church is attempting to form itself, and must fail without the confidence and good-will of the laity who are its members, it is a fit question for the Bishop to judge whether it was expedient that laity form a part of a synod which he was about to call, and what position they should hold in such a synod without trenching on the rights of the clergy. If his clergy disagreed with him, it would be fitting that reference to the Archbishop of Canterbury as patriarch, or whatever else should be his title, as to the expediency of such a course, should be made. If the Bishop have any authority at all, and if he act not in violation of known law or of contract, it must be within the scope of his authority to decide on the manner in which the diocesan synods which he is entitled to convoke shall be convoked, acting as the circumstances of his Church seem to him to require for its welfare.

If the former positions have been correct, then there being no illegality in the calling of the synod by the Bishop, and nothing contrary to good faith in the requirement that the plaintiff should join the rest of the clergy in giving notice of its

meeting, the basis of the jurisdiction to which the plaintiff submitted at his ordination and institution does not fail. He was amenable to this jurisdiction, and entitled to demand only that in its exercise the laws of the association to which both belong, that is, the laws of the Church of England, acknowledged by both to be binding, in as far as these laws could apply in the colony, should govern the proceedings.

Have these laws been obeyed in the proceedings against Mr. Long? I need not recapitulate the circumstances. The plaintiff, conscientiously believing the Bishop's order to have reference to an illegal meeting, disobeyed. He was wrong in this belief. The order was in my opinion perfectly legal. He was cited for a breach of canonical obedience, having before had an interview with the Bishop, at which he was admonished to obey. He was right in the opinion that canonical obedience did not require him to do an illegal act, but wrong in believing what was directed to be illegal. On the citation he appeared, repeated his conviction that the order he was called on to obey was unlawful, and by his counsel put in the protest which has been read in the proceedings. He was thereupon suspended. After his suspension he did not refrain from the exercise of his clerical functions, but continued to officiate as if no suspension had taken place. He was cited again for this contempt, and, not appearing, was deprived of his incumbency.

Substantially, the rules of the Church of England, if the existence of jurisdiction is once admitted, were carried out in the proceedings. The requisites which Burn lays down as being the fundamentals of all judicial proceedings in the ecclesiastical courts in order to a deprivation of a person possessed of a benefice have been as closely complied with as the circumstances of a voluntary jurisdiction would admit. Citation, charge, time assigned, counsel to defend, hearing of witnesses, and sentence. Certainly, if his refusal to obey the order were rightly found to be a breach of canonical obedience, then the power of suspension existed; and if Mr. Long set at nought the suspension, treating it with contempt, then, if for such contempt the power of deprivation existed and was exercised, it would be clear that Mr. Long, thus deprived, could not justly complain against the deprivation.

If what has been said before as to the legality of the proposed synod be correct, and if what has been said as to submission to the jurisdiction of the ordinary be correct likewise, then it would

seem to be plain that the question, whether a refusal to give a notice relating strictly to affairs of the Church was or was not a breach of canonical obedience, was a question which it was agreed, when the plaintiff and defendant came into their relative positions towards each other, should be decided by this ordinary or judge of ecclesiastical discipline, with a reference to the immediate superior, who is here announced to be the Archbishop of Canterbury. Other religious associations have other tribunals to judge of these matters. Episcopal Churches derived from the Church of England have this court of discipline, or none at all. The question is not whether episcopacy is the right form of Church government, but what is the meaning of a submission to episcopacy. So distinctly do I consider that the assent to episcopal and ordinary jurisdiction, admitted in various ways by the plaintiff, must be taken to have meant an acknowledgment of the tribunal which, in episcopacy, inquires into matters of this nature, that having discovered that there was no illegality and no breach of the fundamental agreement in the order which has been disobeyed, I do not think it necessary to inquire whether this disobedience was rightly treated as a breach of canonical obedience. That question the tribunal assented to by the presbyter—that is, the Bishop—was to decide. The assent to jurisdiction implies, likewise, that the person so assenting should be bound by the decision, unless he could show that what he was condemned to do was in breach of the law of the land, or was against the rules of the religious body to which both belong. It is quite within the scope of a voluntary jurisdiction, that a person should submit that an offence against the superior shall be judged of by the superior himself. It is not illegal that men place themselves in such positions. Courts of law will not extend such assents beyond their true limits, but within their limits persons contracting must be bound.

Feeling myself compelled to hold these views, I am not called upon to inquire whether, in the first instance, the plaintiff was rightly found to have committed a breach of his canonical obedience or not. For this purpose, if I am right, he has assented to the jurisdiction of his ordinary, and on the faith of this assent, among other things, he was instituted as incumbent of St. Peter's, Mowbray. By the agreement and position of the parties, a particular tribunal, not in itself illegal, is established to decide a question of this nature. But as the merits of the case have been fully entered into, I do not think that an expression of opinion on this subject is foreign to the duty of the Court.

The synod being, in my opinion, legal, the requirement by the Bishop that the plaintiff should give a notice of this synod was likewise legal. The notice had reference strictly to the internal affairs of the ecclesiastical association to which the plaintiff and defendant both belong. The rubric, which the plaintiff admits as a law binding upon him, states that at a particular time briefs, citations, &c., are to be read. It adds "that nothing is to be proclaimed or published in the Church during the time of divine service but by the minister,—nor by him anything but what is prescribed in the rules of the Common Prayer-book or enjoined by the king, or by the ordinary of the place." It probably is true that this injunction was added, as stated by Wheatley on the Book of Common Prayer, "to prevent the custom of publishing the most frivolous, unbefitting, and ridiculous things in the face of the congregation." But the injunction contains a most pregnant negative. You shall not publish unless enjoined by the ordinary, means you shall, if enjoined by the ordinary,—provided that what he orders is lawful and honest. The Bishop ordered what was lawful and honest; and for reasons of conscience the clergyman disobeyed. The penalty of such disobedience was, first, admonition, then suspension. And if there be assent to jurisdiction, there can be no doubt in my mind that suspension is a penalty attached to an offence of this nature, and which, if this Court were to carry out the laws of this association, we should be called upon to decree.

If there was authority for the suspension by this jurisdiction to which assent had been given, then for the contempt of performing divine service notwithstanding the suspension, contempt arising from a conscientious conviction that something illegal had been done, nothing else could follow than the extreme course pursued,—that of deprivation.

I have not entered on the question of the manner in which evidence was given of the alleged offences. These are admitted throughout: they are admitted in all the ecclesiastical proceedings: they are admitted in the papers before us. The ordinance under which certain evidence was alleged to be taken was inapplicable to the proceedings, but the facts were plain, admitted throughout, and not now disputed. I do not now refer to a difference of interpretation of certain expressions during portion of these proceedings, which for some time occasioned pain on both sides. On no part of what was alleged to have then taken place is my judgment based.

It follows distinctly that if the incumbency was accepted on

the conditions which I have explained, including the assent to jurisdiction, then, if deprivation have been rightly pronounced for the eclesiastical offence, the right to the temporal means which are an accessory to the status of incumbent must follow the deprivation. It. may be a hardship that one man is so subjected to another as this incumbent to his bishop, or that many men are so subject to one as many clergymen, even incumbents, of a Church emanating from the Church of England may be to the bishop; but this is episcopacy, as far as I can understand the episcopacy of the Church of England transferred to a country where the Church of England is not established. This is the episcopacy to which the plaintiff, by becoming a priest in this Church and accepting institution to an incumbency from the Bishop, who is his ordinary, has agreed. I have no concern with the advantages or disadvantages of this mode of church government—with its conformity to Scripture or the contrary. It is enough that it is as legal a form of Church government as any other. What it is, as established in England, we know; what it is here, where it is not established, as regards bishop and incumbent, we have in this case endeavoured to ascertain. If the principle be correct which I have laid down and attempted to work out, that, for the purpose of the contract between the plaintiff and the defendant, we are to take them as having contracted that the laws of the Church of England shall, though only in as far as applicable here, govern both, I have no doubt of my judgment; if the principle be not correct, the groundwork of my judgment is gone, and this Church, unlike others in this colony, has no government and no means of enforcing its discipline. I cannot consider that the plaintiff, while admitting jurisdiction on the part of the Bishop, wished to be understood as meaning nothing: he must be taken as having meant such jurisdiction as could be operative. I would rather conclude, and this I believe to be the fact, that the plaintiff believing that he had been called upon to join in what he was conscientiously convinced was an illegality, refused obedience because of the supposed illegality—denied the jurisdiction on account of this supposed illegality, and acted in defiance of the suspension on the same ground. If he had been right this Court would have been bound to protect him, because his obligation to submit to the voluntary jurisdiction of the ordinary was based on the obligation of the ordinary to demand of him nothing illegal or in violation of their contract. But, as I have shown, in

my opinion he was wrong. He has therefore made out no case for withdrawing from the jurisdiction to which he voluntarily submitted on accepting the incumbency. And to obedience of the sentence of this jurisdiction he is bound.

I have arrived at these conclusions, which are now clear and distinct to my own mind, not without very much hesitation. I can perfectly understand that there is a difference in the opinion of the bench. I can perfectly sympathize with the plaintiff, whom I believe to be wrong. It is impossible not to feel most painfully in proceedings of this nature, in dissensions among Christian men, members of the same Church, that, in the creation of colonial bishoprics there has not been the care on the part of the imperial authorities, which should have been bestowed on so difficult a matter. A transfer of a State Church to places where it was to be a voluntary association, if it was to have existence at all, was effected without any consideration of the difference of the position of the clergy in the new country and the difference of laws. Conflicts of the present distressing nature might have been foreseen: they were unavoidable, as in the present instance, where, in the confusion of opinion respecting the position of this Church, clergymen might not unfairly take a different view of the effects of what they suppose to be the law of the Church of England from that adopted by the Bishop. I believe the plaintiff to have been throughout in error, and for his error he suffers. At the same time this error has been induced by the very anomalous position of the Church of England in this colony, or the Church holding the faith of the Church of England in this colony; and, inasmuch as it has needed the most careful research and not an examination into a few simple rules to understand his own position and that of his bishop, the plaintiff, wrong as he is, and punished for the wrong, is certainly entitled to sympathy.

E. B. WATERMEYER.

JUDGMENT

OF THE

LORDS OF THE JUDICIAL COMMITTEE

OF THE

Privy Council.

Present:—Lord Kingsdown.
The Dean of the Arches.
Sir Edward Ryan.
Sir John T. Coleridge.

This is an Appeal from a decision of the Supreme Court of the Cape of Good Hope in a suit between the Appellant, the Rev. Mr. Long, claiming to be the Incumbent of the parish of Mowbray, in that Colony, and the Respondent, the Lord Bishop of Cape Town. Mr. Long, being in possession of the church of the parish of Mowbray, and in receipt of the income attached to the benefice, refused to obey certain orders which the Bishop, in what he considered the due exercise of his episcopal authority, thought fit to issue, and for such disobedience the Bishop issued against Mr. Long sentences, first of suspension, and afterwards of deprivation. The validity of these sentences, and especially of the last, was the question to be decided by the Court below, which, by a majority of two Judges to one, has held them to be valid.

In the argument at our Bar many questions of great novelty and importance were raised and discussed with remarkable ability. Some of them were considered, and very justly, by the Counsel as seriously affecting the well-being of members of the Church of England in the Colonies and other dependencies of the Crown. We propose to deal with these questions only so

far as may be necessary for the purposes of the present decision, and to abstain as far as possible from saying anything which may prejudice cases that may hereafter arise.

It is advisable, in order to make the reasons of our Judgment intelligible, to state in some detail the facts as they appear upon the record.

The Bishopric of Cape Town was founded in the year 1847. At this time the legislative authority in the Colony of the Cape of Good Hope was vested in the Crown. There was no State Church; all denominations of Christians stood on an equal footing; there were no Ecclesiastieal Courts as distinct from Civil Courts. The Supreme Court, under the Charter of Justice granted in 1832, had supreme jurisdiction in all causes—civil, criminal, and mixed —arising within the Colony, with jurisdiction over all subjects of the Crown, and other persons within the Colony.

In this state of things Letters Patent were issued by the Crown dated the 25th September, 1847, erecting the Colony or Settlement of the Cape of Good Hope and its dependencies, and the Island of St. Helena, into a Bishop's See and Diocese, appointing the Respondent, Dr. Gray, to be ordained and consecrated Bishop of the See, and commanding his Grace the Archbishop of Canterbury to ordain and consecrate him accordingly. The Letters Patent purported to empower the Bishop to perform all the functions appropriate to the office of a Bishop within the diocese of Cape Town, and especially to give institution to benefices; to grant licences to officiate to all rectors, curates, ministers and chaplains, in all churches, chapels and places where divine service should be celebrated according to the rites and liturgy of the Church of England; to visit all rectors, curates, ministers and chaplains, and priests and deacons in holy orders of the United Church of England and Ireland, and to cite them before him, or before the officers whom he was authorized to appoint, and to inquire concerning their morals, as well as their behaviour in their several stations and offices. Power was given to the Bishop to appoint Archdeacons, a Vicar-General, Official Principal, Chancellor, Commissaries, and other officers; and it was provided that an appeal should be made from sentences of the subordinate officers so to be appointed, to the Bishop, and from sentences of the Bishop to the Archbishop of Canterbury. No Ecclesiastical Court was expressly constituted by these Letters Patent, nor was power given to the Bishop to establish one; and it was declared that they

should not extend to repeal, vary or alter the provisions of any Charter whereby ecclesiastical jurisdiction had been given to any Court of jurisdiction within the limits of the said diocese.

The Letters Patent provided that the Bishop of Cape Town should be subject to the Metropolitan See of Canterbury, in the same manner as a Bishop of any See within the province of Canterbury, and should take an oath of due obedience to him as Metropolitan; and they contained a clause that the Bishop might, by an instrument in writing under his hand and seal, addressed to the Archbishop of Canterbury, resign his office; and after acceptance of such resignation by the Archbishop, the Bishop was to cease to be Bishop of Cape Town to all intents and purposes. Dr. Gray having been duly consecrated by the Archbishop of Canterbury, and taken the oath prescribed, went out to the Cape to assume the duties of his office, and continued to discharge them till the latter end of the year 1853.

At that time it was considered by the Queen's Government that the then Diocese of Cape Town was too extensive for one Bishop, and that it would be advisable to divide it and make it into three Dioceses, to be called Cape Town, Graham's Town, and Natal. With a view to this arrangement Dr. Gray, on the 23rd November, 1853, resigned his Bishopric into the hands of the Archbishop of Canterbury, by whom the resignation was accepted, and Dr. Gray ceased to be Bishop of Cape Town.

On the 8th December, 1853, new Letters Patent were issued, by which certain specified parts of the original Diocese of Cape Town were erected into a distinct and separate Bishop's see and diocese, to be called thenceforth the Bishopric of Cape Town, and to this newly-constituted Bishopric Dr. Gray was appointed, and he was also appointed Metropolitan Bishop in the Colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena. The new Letters Patent seem to have been in other respects in the same form with the old.

But previously to the issuing of these Letters, the Crown had granted a Constitution to the Colony of the Cape. Representative institutions had been founded, and a Colonial Legislature established.

Mr. Long was officiating in the Colony as a Minister of the Church of England before any Bishop was appointed there. He had been admitted into Deacon's orders for the Colonies by the Bishop of London in 1844. In the year 1845 he went to Cape

Town, and was appointed by the then Governor of the Colony to be Minister of the English Episcopal Church of Graaff-Reinet, his salary being paid partly by the Governor, partly by the Society for the Propagation of the Gospel, and partly by his congregation. There seems to have been no endowment of any kind attached to this church. He had at this time no other authority for discharging the duties of a Minister in that Church than the Holy Orders which he had received from the Bishop of London, and the appointment of the Governor of the Colony.

Soon after the arrival of the Bishop of Cape Town in the Colony in 1848, and while the first Letters Patent were in force, Mr. Long was ordained priest by the Bishop according to the form and manner of ordaining priests as contained in the Book of Common Prayer; and, on being so ordained, he took the usual oaths prescribed by the laws and usuages in force in England, and amongst others the oath of canonical obedience to the Bishop, by which he engaged to pay to him true and canonical obedience in all things lawful and honest.

On this occasion the Bishop granted, and Mr. Long accepted, a licence from the Bishop to officiate and have the cure of souls over the parish and district of Graaff-Reinet, the Bishop reserving to himself and his successors full power to revoke the licence whensoever he or they should see just cause so to do.

In the year 1854 a clergyman of the English Church, named Hoets, built and proposed to endow an Episcopal Church in the parish of Mowbray, in the Colony of Cape Town, and to convey the church to the Bishop, upon certain terms agreed upon between them, and by a Notarial Act in the Dutch form, dated the 2nd June, 1854, Mr. Hoets transferred in full and free property to the Bishop and his successors in perpetuity, for ecclesiastical purposes, a piece of land therein described, "with the church which the Appearer had erected thereon at his own cost and charge for the worship of Almighty God according to the Liturgy and Ritual of the Church of England, situate in the parish of Mowbray."

By a Notarial instrument of the same date, to which the Bishop and Mr. Hoets were both parties, the conditions on which the grant was made are stated.

The first is that the church shall with all convenient speed be consecrated, and shall be at all times used and enjoyed by the parishioners of the parish of Mowbray free from any charge.

Mr. Hoets covenants with the Bishop to pay a certain salary to the clergyman or incumbent to be appointed and instituted to the spiritual charge of the said church and parish in manner after mentioned during the incumbency of the two first incumbents thereof, as and for a provision or endowment towards the stipends of such two first incumbents, and a mortgage is made by Hoets to the Bishop of certain bonds in order to secure the due payment of the stipend.

The Bishop, in consideration of the premises, covenants with Hoets, that he, the Bishop, and his successors will admit, institute and appoint unto the said endowment, and unto the spiritual charge and care of the said church and parish a Clerk to be presented and nominated by Hoets (such person being a priest in holy orders of the United Church of England and Ireland, or of any of the Colonial Churches in communion with the said United Church, and not subject to any spiritual or ecclesiastical censure or other impediment), as the first incumbent of the said church and parish. And so in like manner upon the death, resignation or removal for any lawful cause of the first incumbent, upon the like presentment of Hoets, to admit, institute and appoint a second incumbent.

There can be no doubt that by these deeds a trust was created between Mr. Hoets and the Bishop, and that the Bishop became trustee of the church and of the funds provided for its support, and held them in that character.

On the 3rd of June, 1854, Mr. Long and several of the parishioners of Mowbray presented a petition to the Respondent, as Bishop and Ordinary of the diocese, praying him to consecrate the church, and on the 6th of June his Lordship consecrated it accordingly, and signed an instrument under his episcopal seal declaring such consecration, and reserving to himself and his successors, Bishops of Cape Town, all ordinary and episcopal jurisdiction, rights and privileges. On the same day his Lordship preached in the parish church, and referred to the Appellant as being henceforth the parish priest.

There were, or were supposed to be, some impediments to the institution and induction of the new incumbent in the English form, and no such ceremonies took place, but Mr. Long entered into possession of the benefice, and discharged his parochial duties, receiving from the Bishop a licence to officiate and have the cure of souls within the parish and district of Mowbray. In

this, as in his former licence, the Bishop reserved power to revoke it if he should see just cause, and Mr. Long on these occasions renewed his oath of canonical obedience to the Bishop.

We will here observe, in order that we may not have occasion again to refer to the point, that we consider the good faith of the arrangements between Mr. Hoets and the Bishop to have required that the nominee of Mr. Hoets, when admitted by the Bishop to this church, should hold and retain it on the same terms as a clergyman in England regularly instituted and inducted, and that the Bishop, by means of this licence, obtained no right to suspend or deprive Mr. Long by the mere exercise of his discretion, or otherwise than for such cause as would have justified a sentence of suspension or deprivation in the case of a Clerk in full and lawful possession of his benefice. Indeed, it is due to the Bishop to say that we did not understand his Lordship to contend for more than this by his Counsel at our Bar.

In the year 1856 the Bishop was of opinion that, for the purpose of settling some scheme of Church government which should be binding upon the religious community of which he was the head, it would be desirable to convene a Synod, consisting partly of clergy and partly of laymen, members of the Church within his Diocese. The measure had been in contemplation, and, indeed, under discussion, for several years before, and different opinions had been entertained both by clergymen and laymen as to its legality and its expediency.

On the 15th November, 1856, the Bishop issued a pastoral letter, in which, after stating the reasons which induced him to believe that such a measure was expedient, if not indeed necessary, for the wellbeing of the Church in the Colony, and explaining the objects which might, in his opinion, be effected by means of a Synod, his Lordship proceeded to declare of what persons the Synod should be composed. These were to be, first, lay delegates, to be elected in the different parishes by adults, being, or at the time of the election declaring themselves to be, members of the Church of England, and of no other religious denomination. Secondly, duly licensed clergy, being in Priests' orders. Deacons were to be authorized to attend and speak, but not to vote.

Some of the subjects to be brought under the consideration of the Synod were then enumerated, including matters not exclusively of ecclesiastical cognizance; as for instance, the tenure and management of Church property; questions relating

to the formation and constitution of parishes; difficulties which had presented themselves with regard to marriages, divorces, and sponsors; and, finally, the desirableness, or otherwise, of seeking to obtain the assistance of the Legislature to carry out the objects of the Synod.

Mr. Long was summoned by the Bishop to attend the Synod, which was appointed to be held at the Cathedral Church in Cape Town on the 21st January, 1857, and he was requested to affix a notice of the intended meeting on his church door and to take the necessary steps for holding the election of a delegate for his parish.

Mr. Long and his parishioners were opposed to this measure. The parishioners held a meeting on the 22nd December, 1856, at which they resolved that no delegate should be elected, and Mr. Long neither attended the Synod himself, nor took any steps to forward the election of a delegate.

No attempt appears to have been made at this time by the Bishop to enforce obedience to his summons, but the Synod was held, and was attended, as it appears, by many of the clergy and laity, and various resolutions were passed by them, which were termed "Acts and Constitutions of the First Synod, held at Cape Town, January 21, 1857."

These regulations provided that a Synod of the clergy should be convened by the Bishop once in three years. They provided for the mode of electing delegates from different parishes, and required that on some Sunday, or other convenient day, during Divine Service, each Minister should give notice of the day and place of meeting for such election in his parish or district, and should cause notice of the same to be fastened to the door of the church or chapel of the parish or district.

The clergy and laity were ordinarily to sit and deliberate together, the Bishop presiding, and to vote as one body; but any member of the Synod might demand a vote by orders, in which case no resolution should be regarded as adopted by the Synod unless carried by a majority of both orders and assented to by the Bishop.

Various rules were made with respect to the formation of parishes, and the institution and induction of clergy; and all presbyters and deacons before institution or induction, or before receiving a licence from the Bishop, and as a condition of receiving such institution, induction, or licence, were to sign a declaration that they would subscribe to all the Rules and Con-

stitutions enacted by the Synod of the Diocese of Cape Town.

A Consistorial Court was appointed for the trial of all offences against the ecclesiastical laws of the Diocese, and various provisions were introduced with respect to the mode in which the trial should be conducted.

The Synod had been convened without any express sanction of the Crown, and no attempt was made to obtain the assistance of the Legislature to carry into effect its objects. It was stated at the Bar that the Synod resolved that it would not be desirable to make any attempt for the purpose, but we do not find any Resolution to this effect amongst the printed papers.

In 1860 the Bishop convened a second Synod, to be held on the 17th of January, 1861; and on the 1st of October, 1860, his Lordship addressed a letter to Mr. Long, inclosing a copy of a pastoral letter which he had issued, and also a copy of the printed Regulations adopted by the Synod for the election of Deputies. The pastoral letter referred to the Acts and Constitutions of the last Synod, and mentioned, as one of the subjects to which his Lordship would have to call attention, the Constitution of the Ecclesiastical Court.

Mr. Long was of opinion that the convening of this Synod without the authority either of the Crown or the Local Legislature was an unlawful act on the part of the Bishop; that the Synod itself was illegal, and its acts of no validity; and he declined therefore to take any steps himself for calling a meeting for the election of Delegates in his parish, but he handed over the papers to the churchwardens and sidesmen that they might act as they should think proper, informing them at the same time of his own views upon the subject.

After some angry correspondence, in which, as usually happens, there are passages in the letters on both sides which the writers perhaps now regret, the result was that Mr. Long refused to give the notice required of the intended election.

On the 27th November, 1860, he was served with a citation signed by the Registrar of the diocese, by which he was cited to appear before the Bishop on Monday, the 4th February, 1861, to answer for having neglected and refused to obey the commands and directions of his Bishop to give notice of a meeting to be held "in terms of a certain letter addressed and forwarded to you, and dated the 1st October, 1860, with the pastoral issued on the same day and therein inclosed."

Certain clergymen, five in number, were named by the Bishop

to be his Assessors, but his Lordship offered if Mr. Long had any personal objection to any of them, to change their names for those of other clergymen who might be resident in the neighbourhood.

On the 4th February, 1861, Mr. Long attended before the Bishop and his Assessors, and delivered in a letter signed by himself stating, in respectful terms, the grounds on which he objected to give the required notice, and adding that if obedience were still required to the Bishop's command in that respect, it was impossible for him to pay it.

Mr. Long's Counsel at the same time handed in a protest signed by them that no Judgment or sentence pronounced by the Bishop as the Judgment or sentence of any alleged Court was in any degree binding on Mr. Long, because no lawful authority was vested in the Bishop to hold, by himself or others, any Court or Courts competent to hear or determine any causes of what kind soever.

The Court adjourned, as it seems, without hearing evidence; there was no question of fact in issue. The Assessors afterwards delivered their opinions in writing to the Bishop, and on the 8th February, 1861, the Bishop pronounced a sentence suspending Mr. Long from the cure of souls, and the exercise of all ministerial functions and offices for a period of three months, and thenceforward until he should have expressed regret for his past disobedience, and his willingness to render obedience for the future.

His Lordship added, from motives which do credit to his feelings, the following note to his Judgment:—

"I have only to add that as you have a wife and children, I should be sorry to deprive you of any portion of your ecclesiastical income. You will be allowed to receive this, therefore, as heretofore for the present."

This sentence was intimated to the churchwardens of the parish, and they were requested to provide a clergyman to perform duty in the church during Mr. Long's suspension. Mr. Long, however, considered the sentence to be a nullity, and he continued to officiate as usual, apparently with the concurrence of the churchwardens.

On the 19th February, 1861, he was served with a citation by order of the Bishop to appear before his Lordship on Wednesday the 6th March, to answer for having failed to render due and canonical obedience to the Bishop, and for acting in defiance

of the laws of the Church and the authority of the Bishop. The citation recited the Bishop's order and Mr. Long's disregard of it, and required him to appear and answer for his contempt, and to hear and receive such Judgment as the Bishop might see right to pronounce, and as the exigency of the case might require or authorize.

Mr. Long declined to attend this summons, and on the 6th March a sentence was pronounced by the Bishop, which after reciting the various offences against his authority of which he considered Mr. Long to have been guilty, concluded in these terms :—

"I, therefore, Robert, by Divine permission, Bishop of Capetown, do, for these repeated acts of disobedience and contempt, withdraw the licence of the Rev. William Long, and do deprive him of his charge and cure of souls in the parish or parochial district of Mowbray, and of all emoluments belonging to the same. And I do, moreover, hereby admonish the said William Long not to officiate again in the said church or parish, and warn him that if he should do so after this his deprivation he will render himself still further liable to the censures of the Church.

"R. CAPETOWN.

"Cathedral Vestry, March 6, 1861."

Notice was given of the sentence on the same day to Mr. Long and to the churchwardens of Mowbray, who were required to conform to it; and a gentleman of the name of Hughes was appointed by the Bishop to officiate in the church till a new Minister was appointed, and to receive one-half of the income.

On the 7th March Mr. Long and the churchwardens applied to the Supreme Court of the Colony of the Cape of Good Hope for an interdict to restrain the Bishop and Mr. Hughes from interfering with him in the performance of his lawful duties as Incumbent of the parish of Mowbray, and from disturbing him in the enjoyment of his lawful emoluments as such Incumbent.

Some further proceedings took place in this matter, but the Plaintiffs were required to file a declaration in regular form for the purpose of trying the important questions in difference.

The present suit was accordingly instituted.

It was a proceeding, of course, in the forms of the Roman-Dutch Law; a claim in convention by the original Plaintiff, and

a defence and claim in reconvention by the Defendant, so that, in fact, both parties were Plaintiffs and both Defendants.

The claim of Mr. Long, after stating those several matters of fact on which he relied, insisted that he was aggrieved by the proceedings of the Bishop, and prayed the protection of the Court, and also a declaration of the law by the Court in conformity with his views on the several points in dispute; and lastly, that he was entitled of right, and without any licence other than his before-mentioned Letters of Order, and the presentation he had already received from Mr. Hoets, and the approval of such presentation publicly made known by the Defendant in June 1854, to exercise all the lawful functions of Minister and Incumbent of St. Peter's Church, Mowbray.

The Bishop filed an answer and plea in reconvention, by which, as Defendant, he pleaded the Letters Patent of 1847 and 1853, the licence granted by him, and accepted by Mr. Long, as officiating Minister, both of Graaff-Reinet and Mowbray; he alleged that until authorized so to do by the Synod and until the formation of rectories by the same authority as aftermentioned, and until certain rules on that behalf had been framed, he could not give, nor had he in any previous instance given, institution to cure of souls, or induction to benefices, in any other way than by licences similar to that granted to the Plaintiff. He insisted that he cited the Plaintiff in accordance with the rules of the Synod, and in exercise of the authority belonging to him as Bishop, conveyed to him by the Letters Patent; that the sentences were Judgments or sentences ecclesiastical or spiritual so issued under the power and authority conveyed to him by the Letters Patent, or otherwise of right belonging to him as Bishop of the Church of which the Plaintiff was a Priest; and that the Plaintiff was, in consequence thereof, removed for lawful cause from the Church of Mowbray; and he maintained, in conclusion, that the Court was not entitled to examine the sentence, but that if it were examined it ought to be affirmed.

This was his defence. In reconvention he prayed, by his second plea, that it might be adjudged that the Letters Patent of the 25th September, 1847, and of the 8th December, 1853, are valid in law, and that they confer the rights and powers claimed thereunder, and that ecclesiastical jurisdiction may thereby be lawfully exercised by him.

By his last plea he prayed that the said Plaintiff in con-

vention and Defendant in reconvention might be restrained by interdict, so long as the sentence of deprivation should continue and remain in force, from occupying or attempting to occupy the Church of St. Peter's, Mowbray, or otherwise interfering with the duties of the Minister of the said church.

On the 15th February, 1862, the Court gave judgment against the Plaintiff in convention and for the Plaintiff in reconvention, except as to his second plea in reconvention, to which we have already referred, and adjudged each party to pay his own costs.

This was in effect a decision in all material points in favour of the Bishop, and Mr. Long has been admitted to appeal to Her Majesty. The case seems to have been very well argued in the Court below, and though there was some difference of opinion amongst the three Judges who decided it, no one who reads their opinions can fail to admire the great learning and ability which they have brought to bear upon the questions submitted to them, and the judicial temper and moderation which they have shown in a case calculated to produce great excitement in the colony.

The first question which we have to consider is, what authority did the Bishop possess under and by virtue of his Letters Patent at the time when these sentences were pronounced? The Judges below have been unanimous in their opinion: 1st, that all jurisdiction given to the Bishop by the Letters Patent of 1847 ceased by the surrender of the bishopric in 1853, and the issue of the new Letters Patent; and 2ndly, that the Letters Patent of 1853 being issued after a constitutional Government had been established in the Cape of Good Hope, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the colony, even if it were the intention of the Letters Patent to create such jurisdiction, which they think doubtful. In these conclusions we agree.

Dr. Gray had been duly appointed and consecrated a Bishop of the Anglican Church in 1847, and such he remained after the resignation of his See; but by such resignation he surrendered all territorial jurisdiction and power of proceeding judicially *in invitos*, so far as such authority depended upon the Letters Patent of 1847. These points have not only been decided by the Court below, but have been embodied in their Judgment, by which they have expressly rejected the second claim above stated of the Lord Bishop.

But a majority of Judges below has held that the defect of

coercive jurisdiction under the Letters Patent has been supplied by the voluntary submission of Mr. Long, and that he is on that principle bound by the decision of the Bishop. This point we have next to consider.

The Church of England, in places where there is no church established by law, is in the same situation with any other religious body, in no better but in no worse position, and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.

It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

In such cases the tribunals so constituted are not in any sense courts; they derive no authority from the Crown, they have no power of their own to enforce their sentences; they must apply for that purpose to the courts established by law, and such courts will give effect to their decision, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

These are the principles upon which the courts in this country have always acted in the disputes which have arisen between members of the same religious body not being members of the Church of England. They were laid down most distinctly, and acted upon, by Vice-Chancellor Shadwell and Lord Lyndhurst in the case of Dr. Warren, so much relied on at the Bar, and the report of which in Mr. Grindwood's book seems to bear every mark of accuracy.

To these principles, which are founded in good sense and justice, and established by the highest authority, we desire strictly to adhere, and we proceed to consider how far the facts of this case bring Mr. Long within their operation.

To what extent, then, did Mr. Long, by the acts to which we have referred, subject himself to the authority of the Bishop in temporal matters? With the Bishop's authority in spiritual

affairs, or Mr. Long's obligations *in foro conscientiæ*, we have not to deal.

We think that the acts of Mr. Long must be construed with reference to the position in which he stood as a clergyman of the Church of England, towards a lawfully appointed Bishop of that Church, and to the authority known to belong to that office in England; and we are of opinion that by taking the oath of canonical obedience to his lordship, and accepting from him a licence to officiate, and have the cure of souls within the parish of Mowbray, subject to revocation for just cause, and by accepting the appointment to the living of Mowbray under a deed which expressly contemplated as one means of avoidance the removal of the incumbent for any lawful cause,—Mr. Long did voluntarily submit himself to the authority of the Bishop to such an extent as to enable the Bishop to deprive him of his benefice for any lawful cause, that is, for such cause as (having regard to any differences which may arise from the circumstances of the Colony) would authorize the deprivation of a clergyman by his Bishop in England. We adopt the language of Mr. Justice Watermeyer, p. 81, that for "the purpose of the contract between the Plaintiff and Defendant, we are to take them as having contracted that the laws of the Church of England shall, though only as far as applicable here, govern both."

Is, then, Mr. Long shown to have been guilty of any offences which, by the laws of the Church of England, would have warranted his suspension and subsequent deprivation? This depends mainly on the point whether Mr. Long was justified in refusing to take the steps which the Bishop required him to take, in order to procure the election of a delegate for the parish of Mowbray to the Synod convened for the 17th January, 1861.

In what manner and by what acts did he contract this obligation? The Letters Patent may be laid out of the case, for if the Bishop's whole contention in respect of them be conceded, they conferred on him no power of convening a meeting of clergy and laity to be elected in a certain manner prescribed by him for the purpose of making laws binding upon Churchmen.

A very elaborate argument was entered into at our Bar in order to show that Diocesan Synods may be lawfully held in England without the licence of the Crown, and that the Statute with respect to Provincial Synods does not extend to the Colonies.

It is not necessary to enter into the learning on this subject.

It is admitted that Diocesan Synods, whether lawful or not, unless with the licence of the Crown, have not been in use in England for above two centuries; and Mr. Long, in recognizing the authority of the Bishop, cannot be held to have acknowledged a right on his part to convene one, and to require his clergy to attend it. But it is a mistake to treat the Assembly convened by the Bishop as a Synod at all. It was a meeting of certain persons, both clergy and laity, either selected by the Bishop, or to be elected by such persons and in such manner as he had prescribed, and it was a meeting convened, not for the purpose of taking counsel and advising together what might be best for the general good of the society, but for the purpose of agreeing upon certain rules, and establishing in fact certain laws, by which all members of the Church of England in the Colony, whether they assented to them or not, should be bound.

Accordingly, the Synod, which actually did meet, passed various acts and constitutions purporting, without the consent either of the Crown or of the Colonial Legislature, to bind persons not in any manner subject to its control, and to establish Courts of Justice for some temporal as well as spiritual matters, and in fact the Synod assumed powers which only the Legislature could possess. There can be no doubt that such acts were illegal.

Now Mr. Long was required to give effect, as far as he could, to the constitution of this body, and to take steps ordered by that body for convening one of a similar nature. He was furnished with a copy of the Acts and Constitution of the last Synod, and he was requested to attend carefully to the inclosed printed regulations with regard to the election of Delegates.

He clearly, therefore, was required to do more than give notice of a meeting, and he could not give the notice at all without himself fixing the time and place at which the meeting was to be held. He was required to do various acts of a formal character for the purpose of calling into existence a body which he had always refused to recognize, and which he was not bound by any law or duty to acknowledge.

The oath of canonical obedience does not mean that the clergyman will obey all the commands of the Bishop against which there is no law, but that he will obey all such commands as the Bishop by law is authorized to impose; and even if the meaning of the rubric referred to by the Bishop in his case were

such as he contends for,—which we think that it is not,—it would not apply to the present case, in which more was required from Mr. Long than merely to publish a notice.

We are therefore of opinion that the order of suspension issued by the Bishop was one which was not justified by the conduct of Mr. Long, and that the subsequent sentence of deprivation founded upon his disobedience to the order of suspension must fall with it.

It was strongly pressed, both before us and in the Court below, that supposing these sentences to be erroneous, Mr. Long had no remedy against them except by Appeal to the Archbishop of Canterbury under the provisions of the Letters Patent. What authority his Grace might possess under the Letters Patent, or otherwise, to entertain such an Appeal if it had been presented, it is unnecessary, and we think it is inexpedient, to discuss. It is sufficient to say no such Appeal has been presented, and that the suit in which this Appeal is brought respects a temporal right, in which the Appellant alleges that he has been injured. It calls for a decision as to the right of property, and involves the question whether Mr. Long has ceased by law to be what in England is termed cestui que trust of funds of which the Bishop is trustee. Whatever else Mr. Long may by his conduct have done, we cannot hold that he has precluded himself from exercising the power which under similar circumstances he would have possessed in England, of resorting to a Civil Court for the restitution of Civil rights, and of thereby giving to such Courts jurisdiction to determine questions of an ecclesiastical character essential to their decision. Indeed, in this case the Appellant and Respondent have alike found it necessary to call upon the Civil Court to determine the right of possession of the Church of Mowbray.

We think that even if Mr. Long might have appealed to the Archbishop, he was not bound to do so; that he was at liberty to resort to the Supreme Court; and that the Judges of that Court were justified in examining, and indeed, under the obligation of examining, the whole matter submitted to them. We, of course, are in the same situation; and after the most anxious consideration we have come to the conclusion that the sentence complained of cannot be supported, and therefore we must humbly advise Her Majesty to reverse it, and to declare that Mr. Long has not been lawfully removed from the Church of Mowbray, but remains Minister of such church, and entitled to the emoluments belonging to it.

Being of this opinion, we are relieved from the necessity of considering, as a ground of our decision, whether the course adopted by the Right Reverend Respondent in the proceedings against Mr. Long was in all respects proper, and whether the proceedings themselves, if the Bishop be regarded as acting and entitled to act with the authority of a Visitor sitting *in foro domestico*, were conducted with that attention to the rules of substantial justice and that strict impartiality which are necessary to be observed by all tribunals, however little fettered by forms. Much argument was addressed to us at the Bar in this part of the case, and it would not be proper to pass it altogether without notice; and first with respect to the suspension, and the constitution of the tribunal for the trial of Mr. Long on the first charge against him.

It cannot be held that all the provisions which would have been applicable to such a case under the Church Discipline Act in England were necessary to be observed in the Colony. This was impossible, but care should have been taken to secure, as far as possible, the impartiality and knowledge of a judicial tribunal. Here the Bishop was not merely in form but substantially the prosecutor, and a prosecutor whose feelings, from motives of public duty as well as from the heat necessarily generated in the purest minds by a long and eager controversy, were deeply interested in the question. It was, perhaps, necessary that he should preside as the Judge before whom the cause was heard, and by whom the sentence was pronounced; but he should have procured, as a Bishop in England under such circumstances would have done, the advice and assistance, as Assessors, of men of legal knowledge and habits, unconnected with the matter in dispute, and have left it to them to frame the decision which he would afterwards pronounce. But instead of adopting this course, he selected as assistants three gentlemen, all clergymen sharing his own opinions on the subject of controversy, and all themselves members of that Synod which Mr. Long was accused of treating as illegal.

Mr. Long was cited for refusing to give the required notice, but the sentence was not grounded entirely on this charge. The protest which he had given in by his Counsel against the proceedings was treated as a very grave offence. The Bishop, in speaking of it, says—

"To put in such a document is virtually to reject Episcopacy and the Church, and to stop on the very confines of schism, if not to have overstepped the line."

Mr. Long's conduct at private meeting with the Bishop is discussed, as to which there is great doubt what really took place, and no regular evidence appears to have been produced, or was in fact admissible, for it was not to the point in question; and from the language of the Bishop in delivering his judgment it may be inferred that the sentence against Mr. Long was not founded entirely on the only charge which he had been summoned to meet.

The proceedings which led to the subsequent deprivation are open to no less objection than those which resulted in the suspension.

The Bishop had declared before the first Synod that there were no rules or proceedings for trying ecclesiastical offences, and one of the objects of the Synod was to supply the deficiency. The Synod had established a Consistorial Court, and certain regulations by which the trials of clergymen and of laymen before such Court should be guided.

These regulations had amongst other things provided that no sentence of deprivation should be pronounced by any person whatever, but only by the Bishop with the assistance of the Chancellor of the diocese, or, in case there be no such officer, some legal adviser whom he may see fit to appoint. The Bishop insisted that Mr. Long was bound by the rules established by this Synod, and must therefore, it should seem, have considered himself bound by them; and yet without any regard to these rules, without calling in the assistance of any legal adviser whatever, without any analogy to the course of proceedings in England by which the judgment of impartial persons acquainted with the law is secured, the Bishop pronounces sentence of deprivation.

On this occasion, as on the former, the sentence seems to have been founded on what are termed repeated acts of disobedience and contempt by Mr. Long, instead of on the single charge which he was called upon by the citation to meet.

We cannot say, therefore, that the proceedings in this case have been conducted in a proper manner, though our Judgment rests on other grounds already stated.

We have been much embarrassed by the question how we ought to deal with the costs in this case. We do not doubt that the Bishop has acted in the conscientious discharge of what he considered to be his public duty, and he has succeeded, at great personal trouble and expense, in bringing this contention in the Court below to a favourable issue. On the other hand, it is

impossible not to feel that Mr. Long has been subjected to probably not less trouble and expense by a course of proceeding on the part of the Bishop which we have been obliged to pronounce not warranted in law.

Feeling the hardship of the case upon the Right Reverend Respondent, we still think that we are bound to award the costs of the suit and of the appeal to the Appellant. We cannot, of course, suggest to her Majesty any consideration of what it may be fit to do, at the expense of the public; for this is beyond our province. But it is not beyond our province to observe that the Lord Bishop has been involved in the difficulties by which he has been embarrassed in a great measure by the doubtful state of the law and by the circumstance that he, not without some reason, considered the Letters Patent under which he acted to confer on him an authority which, at the time when he acted under them, her Majesty had no authority to grant, and that either in this or in some other suit it was important to the interests of the Colony generally, and especially of the members of the Church of England within it, that the many questions which have arisen in this case should, as far as possible, be set at rest.

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